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PARLIAMENTARY PRIVILEGE AND THE BILL OF RIGHTS

THE letters in which the London Electricity Board, through their solicitors, Messrs. Sydney Morse & Co., threatened to institute proceedings for libel against the Rt. Hon. George R. Strauss, M.P., in respect of statements made by him in a letter addressed to a Minister of the Crown, set off a train of events which has posed some of the most interesting and important constitutional problems of this century. Among the issues that have arisen have been the proper interpretation of Article 9 of the Bill of Rights and a group of almost forgotten eighteenth-century statutes, the implications of the relationships between M.P.s and members of the public and M.P.s and Ministers, the difficulties caused by the restricted character of ministerial responsibility to Parliament for the activities of the boards administering nationalised industries, and the connection between privilege of Parliament and privilege in the law of defamation. In the course of the controversy the House of Commons twice broke new ground, first by seeking an opinion from an outside body on a question relating to the extent of its own privileges, and secondly by disagreeing with a report of the Committee of Privileges. And lurking in the shadows all the while lay the ghosts of Stockdale and the men of Aylesbury.

THE COURSE OF EVENTS

On February 8, 1957, Mr. Strauss, a former Minister of Supply, wrote to the Paymaster-General (representing the Minister of Power in the House of Commons [1]), complaining of the manner in which the London Electricity Board, one of the area boards constituted under the Electricity Act, 1947, invited tenders for the purchase of their scrap metal. He mentioned that he had an indirect personal financial interest in the matter inasmuch as his own firm had as a

1 The Minister of Power, Lord Mills, was a member of the House of Lords, and the Paymaster-General was given the duty of answering in the Commons for matters relating to the Minister's department.

subsidiary a firm of non-ferrous metal merchants. He asserted, *inter alia*, that this subsidiary, " together with everyone else in the industry," considered " the behaviour of the London Electricity Board a scandal which should be instantly rectified," and that " strong suspicion has been engendered throughout the trade by the behaviour of the Board." [2] The Minister replied to the effect that the matter was one of day-to-day administration and, as such, the responsibility of the Board,[3] and that it would be brought to the attention of the Chairman of the Board. There followed correspondence and an interview between the Chairman of the Board and Mr. Strauss. On March 27, 1957, the Board's solicitors wrote to Mr. Strauss informing him that unless he withdrew and apologised for allegations he had made proceedings for libel would be instituted against him on behalf of the Board and its purchasing officer. The Board considered the reply to this letter to be unsatisfactory and on April 4 its solicitors wrote to Mr. Strauss's solicitors notifying them that a writ would be served the following week.

On April 8 Mr. Strauss complained in the House of Commons that the letters in question were calculated to impede him in the performance of his parliamentary duties and constituted a breach of the privileges of the House. The Speaker having ruled that a prima facie case of breach of privilege had been made out, the House ordered that the matter be referred to the Committee of Privileges.[4]

On October 30, 1957, the Committee of Privileges issued its report. Its conclusions, adopted by a majority, were as follows [5]:

> (a) In writing his letter of February 8 to the Paymaster-General " Mr. Strauss was engaged in a ' proceeding in Parliament ' within the meaning of the Bill of Rights of 1688 " [*sic*].
>
> " (b) The London Electricity Board in threatening by the letters from themselves and their Solicitors to commence proceedings for libel against Mr. Strauss for statements made by him in the course of a proceeding in Parliament are threatening to impeach or question the freedom of Mr. Strauss in a Court or Place outside Parliament, and accordingly the London Electricity Board and their Solicitors have acted in breach of the Privilege of Parliament.
>
> " (c) The opinion of the Judicial Committee of the Privy Council should be sought on the question whether the House would be acting contrary to the Parliamentary Privilege Act, 1770, if it treated the issue of a writ against a Member of Parliament in respect of a speech or proceeding by him in Parliament as a breach of its Privileges."

[2] The relevant correspondence is published as an appendix to the Fifth Report from the Committee of Privileges for 1956–57 (H.C. 305 of 1956–57, viii–xvi).

[3] For an account of ministerial powers and responsibilities in relation to the nationalised industries, see Griffith & Street, *Principles of Administrative Law* (2nd ed.), 279–294. See also Erskine May, *Parliamentary Practice* (16th ed.), 361.

[4] 568 H.C. Deb. 819–822.

[5] H.C. 305 of 1956–57, para. 19.

It recommended also that the matter should again be referred to it when the opinion of the Judicial Committee of the Privy Council had been received.

When the question was next brought before the House of Commons the motion was not that the House agree with the Committee of Privileges in its report but that an address be presented to Her Majesty requesting her to make a reference to the Judicial Committee of the Privy Council in conformity with conclusion (*c*) of the Committee of Privileges. The Leader of the House, Mr. R. A. Butler, in moving the motion, affirmed his view that the House was master of its own privileges but said that it was important for the House to have the benefit of the opinion of the highest legal authority on the interpretation of statutes affecting those privileges before deciding upon their extent.[6] Although a substantial minority of members took the view that the House ought to determine the whole question without assistance from outside, the motion was carried, on a free vote, by 164 votes to 106.

It must be made clear that in resolving to seek a special reference to the Judicial Committee under section 4 of the Judicial Committee Act, 1833,[7] the House was not impliedly surrendering its historic claim to the exclusive right to determine the ambit of its own privileges. The opinion of the Judicial Committee would be merely advisory and would in no way be binding on the House. Moreover, the House reserved to itself the power of decision on the issues raised by conclusions (*a*) and (*b*) of the Committee of Privileges—issues that involved difficult questions of law—and asked for a special reference only on one narrow point of statutory interpretation. Nothing in the procedure adopted could reasonably be construed as detracting from the resolution of 1837 [8] in which the House proclaimed the doctrine, which it has never abandoned, that it had "the sole and exclusive jurisdiction to determine upon the existence and extent of its privileges and that the institution or prosecution of any action, suit or other proceeding, for the purpose of bringing them into discussion or decision before any court or tribunal elsewhere than in Parliament," was "a high breach of such privilege."

[6] 579 H.C. Deb. 397–398 (December 4, 1957).

[7] On two previous occasions the Crown has made special references to the Judicial Committee at the request of the House of Commons for opinions on the interpretation of statutes imposing particular disqualifications for sitting and voting in the House: *Re Sir Stuart Samuel* [1913] A.C. 514; *Re Rev. J. G. MacManaway* [1951] A.C. 161. In each case the House adopted the opinion of the Judicial Committee. The House could have decided these cases entirely by itself in accordance with its privilege to provide for its own constitution. The character of the special reference in the *Strauss* case was somewhat different, for the House was seeking advice on the *extent* of one of its privileges as distinct from the proper application of a privilege of unquestioned scope to a particular case.

[8] Commons Journals (C.J.) (1837) 418–419.

In accordance with the address presented by the Commons, the Crown made an Order in Council referring to the Judicial Committee the question whether the House would be acting contrary to the Act of 1770 if it treated the issue of a writ against an M.P. in respect of a speech or proceeding by him in Parliament as a breach of its privileges. On May 7, 1958, the Judicial Committee answered this question in the negative.[9] The House resolved that the Judicial Committee's opinion, together with the previous report of the Committee of Privileges, be referred to the Committee of Privileges.[10]

In a brief report, issued on June 24,[11] the Committee of Privileges recapitulated the conclusions arrived at in the earlier report, and observed that it did not conceive it to be its duty to review them. It went on to recommend that in view of the special circumstances of the case, which was the first arising out of a letter from an M.P. to a Minister that had come before the Committee, and bearing in mind that no proceedings had in fact been taken, the House should take no further action in the matter. A motion was moved by the Leader of the House on July 8 that the House agree with the Committees of Privileges in their reports.[12] On a free vote, the motion was defeated by 218 votes to 213 [13]; and an amendment moved by Mr. Herbert Morrison to the effect that Mr. Strauss's letter of February 8, 1957, was not a proceeding in Parliament and that the letters from the Chairman of the Board and the Board's solicitors did not, therefore, constitute a breach of privilege was carried. The Board subsequently announced that in view of the Commons debate they had decided not to proceed with their intended libel action against Mr. Strauss, but that they were free to reconsider their decision in the light of changing circumstances. They had also asked the Minister of Power to arrange for an independent inquiry to be held into the subject-matter of the allegations made by Mr. Strauss, and the Minister had agreed to this request.[14]

Article 9 of the Bill of Rights

Before examining the opinion of the Judicial Committee and the implications of the resolution passed by the House of Commons, we may consider a fundamental legal problem on which the Judicial Committee made no pronouncement because it was not within the terms of the order of reference and which was hardly discussed at all in the Commons debates. Article 9 of the Bill of Rights provides

[9] *Re Parliamentary Privilege Act, 1770* [1958] A.C. 331; Cmnd. 431 (1958).
[10] 589 H.C.Deb. 1058 (June 17, 1958).
[11] H.C. 227 of 1957–58.
[12] The debate is reported in 591 H.C.Deb. 207–346.
[13] Only twenty-eight Government supporters voted for the motion, and only eleven Labour members voted against it.
[14] *The Times*, July 11, 1958, p. 8.

> That the freedom of speech, and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament.

Leaving on one side for the present the question of the meaning of "proceedings in Parliament," what construction should be placed on Article 9?

There is no doubt that Article 9 is primarily declaratory of the privilege of freedom of speech in Parliament. That privilege had already been affirmed by Parliament in Strode's Act, 1512,[15] in which it was laid down that suits against members of Parliament for "any Bill, speaking, or declaring of any matter concerning the Parliament, to be communed or treated of," were "utterly void and of none effect"; and in *Eliot's* case the courts had accepted that words spoken in Parliament could not be dealt with out of Parliament.[16] To this extent the privilege declared by Article 9 means that no person may be convicted in criminal proceedings or have judgment awarded against him in civil proceedings in respect of any speech made by him in Parliament or in respect of his participation in any other form of proceedings in Parliament. The most important application of the privilege is to invest with absolute privilege in the law of defamation words spoken in either House and before committees of either House.[17] Article 9 implies also that a member who abuses his privilege of freedom of speech may be called to account and subjected to disciplinary sanctions by the House of which he is a member.[18] It implies, further, that certain forms of interference committed by persons outside the House with the freedoms enshrined in the article may properly be treated by the House, in the exercise of its collective privilege, as a breach of parliamentary privilege. Attempts to sway or impede a member's conduct in the House by means of bribery, molestation or intimidation [19] can clearly be treated as breaches of privilege. But does it follow that the House may properly treat as a breach of privilege the bringing of an action, or the threat to bring an action, against a member in respect of words or conduct that fall within the protection afforded by Article 9? The House of Commons has in the past acted on the assumption that the institution of legal proceedings against persons other than members of the House in respect of statements protected by Article 9 is a breach of its privileges,[20]

15 4 Hen. 8, c. 8. This was more than a *privilegium*.

16 (1668) 3 St.Tr. at 294 f. See also *Lake* v. *King* (1680) 1 Saund. 131.

17 See *Dillon* v. *Balfour* (1887) 20 Ir.L.R. 600; *Goffin* v. *Donnelly* (1881) 6 Q.B.D. 307. Absolute privilege in the law of defamation also extends *ex necessitate* to the proceedings of those colonial legislatures to which the *lex et consuetudo parliamenti* does not apply: *Chenard & Co.* v. *Arissol* [1949] A.C. 127 at 133–134; see also *Gipps* v. *McElhone* (1881) 2 N.S.W.L.R. 18 (privilege attaches to the giving of notice of a parliamentary question).

18 See Erskine May, *op. cit.* (16th ed.), 53.

19 *Cf. R.* v. *Richards, ex p. Fitzpatrick and Browne* (1955) 92 C.L.R. 157.

20 As in *Gee's Case*, C.J. (1693–97) 599, 698–699 (committal for contempt for instituting action for libel against petitioners in respect of defamatory words in petition lodged by them with the House), and in *Phillips' Case*, C.J. (1845)

and it would certainly have been prepared to regard the institution of legal proceedings against a member in such circumstances as an *a fortiori* case.[21] And it is impossible to deny that Article 9 of the Bill of Rights is capable of bearing this interpretation.

However, neither assumptions nor explicit declarations made by the House of Commons with respect to the extent of its own privileges can be accepted as conclusive. The law and custom of Parliament are part of the general law of the land. The courts reserve to themselves the right to determine, in a proper case, whether a claim to parliamentary privilege is well founded, and they have unequivocally rejected the claim made by the House of Commons[22] to be the sole interpreter of the extent of its own privileges.[23] In the result, as every student of constitutional law ought to know, "there may be at any given moment two doctrines of privilege, the one held by the courts, the other by either House, the one to be found in the Law Reports, the other in *Hansard*, and no way of resolving the real point of issue should conflict arise."[24] In the last resort it is open to the House to impose its own view by committing to prison persons whom it claims to have violated its privileges and by abstaining from specifying in the warrant for commitment the facts alleged to constitute the breach of privilege or contempt,[25] as when it committed Pemberton and Jones, two judges of the King's Bench, for overruling a plea to the jurisdiction of their court,[26] when it committed Stockdale and his solicitor for bringing actions (which were successful) against Messrs. Hansard,[27] and when it committed the Sheriff of Middlesex for executing the lawful judgment of a court[28]; but the successful imposition of one point of view is not to be equated with an authoritative declaration of the law. Dramatic conflicts of this character have not arisen in recent times, partly because both Houses have shown greater forbearance in asserting their views and partly because the courts have trodden warily when questions of parliamentary privilege have arisen incidentally before them.

672, 680, 696–697 (bringing of an action for slander against a witness for evidence given by him before a committee of the House adjudged a breach of privilege).

21 The fact that the House has not declared the institution of such proceedings to be a breach of privilege for over a century is indicative only of its self-restraint. *Cf.* conclusion (*b*) of the Committee of Privileges in the *Strauss* case; see p. 466, *ante*.

22 See p. 467, *ante*.

23 See esp. *Stockdale* v. *Hansard* (1839) 9 A. & E. 1, and for an early leading case, *Benyon* v. *Evelyn* (1664) O.Bridg. 324 at 330–331, 333.

24 Keir & Lawson, *Cases in Constitutional Law* (4th ed.) 125.

25 *Aliter* if the grounds for commitment are specified and they do not disclose any facts which can reasonably be construed as constituting a breach of privilege or contempt: *R.* v. *Paty* (1704) 2 Ld.Raym. 1105 at 1112–1114, *per* Holt C.J.; *Burdett* v. *Abbot* (1811) 14 East 1 at 150–151; *Stockdale* v. *Hansard* (*ante*) at 169; *Sheriff of Middlesex's Case* (1840) 11 A. & E. 273 at 289–290.

26 *Jay* v. *Topham* (1689) 12 St.Tr. 822.

27 Erskine May, *op. cit.* (16th ed.), 160–161.

28 *Sheriff of Middlesex's Case* (*supra*).

Nevertheless, "the old dualism remains unresolved"[29], and a lawyer may be pardoned for preferring the view maintained by the courts that neither House can be conceded the right to "make a matter one of privilege simply by declaring it to be so."[30]

There appears to have been no case decided since 1689 in which a court has expressly recognised that the institution of proceedings for defamation against a member of either House in respect of a matter covered by Article 9 is a breach of parliamentary privilege. If, as we have suggested, the views of the House of Commons on this question cannot be accepted as conclusive, the problem may be reviewed as if it were *res integra*. Let us suppose that X sues Y, an M.P., for defamatory words used in the course of what was, in Y's submission, a proceeding in Parliament. Y may invoke the inherent jurisdiction of the court to stay the proceedings on the ground that they are an abuse of its process,[31] or take out a summons to have service of the writ set aside, or enter a conditional appearance and ask the court to strike out the pleadings on the ground that they disclose no reasonable cause of action. The action may therefore never come to trial, and if it does the court may dismiss it on the ground that the words complained of were absolutely privileged. But in any event it will and must determine in the first instance whether it has jurisdiction over the matter. As Patteson J. observed in *Stockdale* v. *Hansard*,[32]

> every court in which an action is brought upon a matter generally and prima facie within its jurisdiction, and in which by the course of the proceedings in that action, the powers and privileges and jurisdiction of another court come into question, must of necessity determine as to the extent of those powers, privileges and jurisdiction . . .

The court will not hold its hand merely on the strength of a bare assertion by the defendant that he is protected by privilege, or on a certificate given by the Speaker to that effect,[33] or even on the strength of a resolution passed by the House that the continuance of the proceedings will be a breach of its privileges; nor will it consider its jurisdiction to be ousted if the House resolves to commit the plaintiff and his legal advisers for breach of privilege. Indeed, by refusing to recognise any right claimed by the House to prejudge the issue and by insisting on their own right and duty to determine independently the preliminary jurisdictional question, the courts may be regarded as asserting by implication that it would be improper for the House to take any punitive measures against a

[29] Erskine May, *op. cit.* (16th ed.), 173; *Re Parliamentary Privilege Act, 1770* [1958] A.C. 331 at 354.
[30] Erskine May, *op. cit.* (16th ed.), 171.
[31] *Cf. Chaffers* v. *Goldsmid* [1894] 1 Q.B. 186.
[32] (1839) 9 A. & E. at 203; see also Anson, *Law and Custom of the Constitution*, i (5th ed.), 193–194. And see, in another context, *Wilkinson* v. *Barking Corporation* [1948] 1 K.B. 721 at 725, *per* Asquith L.J.
[33] Contrast the procedure prescribed by s. 1 of the Parliamentary Papers Act, 1840.

party having recourse to them, no matter whether the defendant is or is not protected by Article 9. On the other hand, according to the conception of privilege hitherto maintained by the House of Commons it would be a breach of its exclusive privileges not merely for a plaintiff to institute legal proceedings in respect of a matter which, in its opinion, was protected by Article 9 but also for a court to undertake the preliminary inquiry into the question whether, in point of law, the matter did fall within the ambit of Article 9, at least if the House had already pronounced its opinion on the matter [34]; so that the proceedings before the master or the judge would be *coram non judice* and unprotected by the immunities attached to judicial proceedings. This view is not, of course, an impossible one [35]; but its implications are remarkable.

The problem under consideration may be approached by an alternative route. Every breach of the privileges of the House of Commons is a contempt of the House. The House has an undoubted power to commit for contempt. This power is recognised as being justified on essentially the same grounds as the corresponding powers of superior courts of record.[36] It cannot seriously be argued that a judge of one of the superior courts could lawfully commit a person for contempt for having erroneously disputed his exclusive jurisdiction in another court otherwise than by way of appeal; the fact that no redress might be obtainable by a person thus committed is for this purpose irrelevant. That similar reasoning may be applicable to commitment by the House of Commons is suggested by the observations of the House of Lords when remonstrating against the action taken by the Commons in committing the five Aylesbury voters who had had the temerity to sue their returning officer [37]:

> If a man mistakes his case, in believing himself to have a just cause of suit when he has not; if he mistakes his court, by applying to an incompetent jurisdiction; he will fail of relief, and be liable to costs; but to no other punishment: he is not guilty of a crime, nor is it a contempt of the court that has the proper jurisdiction.

Nor would it be a contempt of court to bring an action in another court against a judge, or against parties, counsel or witnesses who

[34] And *a fortiori* if the court erroneously determined that it had jurisdiction to hear the action on its merits.

[35] It receives, perhaps, some colour of support from Strode's Act to the extent that this Act declares proceedings against members in respect of their parliamentary conduct to be "absolutely void and of none effect"; but even assuming that these words are to be read in a strictly literal sense, the question who is to judge whether the proceedings are valid has still to be answered.

[36] See esp. *Burdett* v. *Abbot* (1811) 14 East 1.

[37] Lords Journal (1702–04), 699, in an address to the Crown replying to a resolution of the Commons (C.J. (1702–04), 308). However, the Lords appeared to concede that it would be a breach of privilege to sue a person who was entitled to privilege of Parliament (L.J. (1702–04), 703, 706). For later developments in the controversy, see L.J. (1702–04), 707, 712–713.

had been engaged in the proceedings before him, in respect of words spoken which were, as a matter of law, absolutely privileged.

It may further be argued that the bringing of an action for defamation against an M.P. in respect of words protected by Article 9 does not involve the questioning or impeachment of any privilege of Parliament but involves an assertion that the particular words complained of do not fall within the scope of an admitted privilege. Even if the word "impeach" is to be given the broadest possible construction that it was capable of bearing in 1689 and is to be understood as meaning "impede, hinder, or prevent,"[38] neither the House as a whole nor the member sued would be impeded in the exercise of freedom of speech, because if the words complained of did in truth fall within the protection of Article 9 the court would decline jurisdiction or would dismiss the action at the trial on the ground that the words were covered by absolute privilege. Finally, even if it is conceded that a breach of privilege may be committed when a court erroneously assumes jurisdiction in respect of a matter within the scope of Article 9, the threat to issue a writ, or the issue of a writ (although specially indorsed), cannot be construed as anything more than a measure preliminary to the assumption and exercise of jurisdiction.

For the reasons already indicated, it is respectfully submitted that there is doubt whether, on the true construction of Article 9 of the Bill of Rights, either House can properly treat the bringing of an action in the courts in respect of a matter covered by Article 9 as a breach of its privileges. It must at once be conceded, however, that formidable arguments can be deployed by those who do not share these doubts. Thus, it may be pointed out that the doubts here expressed have never been explicitly formulated in any judgment of a court; that they are the result of implications drawn from attitudes towards parliamentary privilege adopted by courts but rejected by the House of Commons; that the views of the House on these matters are at least as authoritative as the views entertained, or supposedly entertained, by the courts and surely weightier than the possibly hazardous speculations of an academic lawyer. The House is entitled by the law and custom of Parliament to treat any encroachment upon its exclusive jurisdiction as a contempt and breach of privilege. Analogies with the concept of contempt of court are inapt; the concept of breach of privilege and contempt of Parliament is a larger one. In asserting its own view of privilege the House may come into conflict with the courts and may, indeed, fail to apply the law correctly; but the possibility of conflict is inescapable as long as the courts continue to maintain their views about jurisdiction in relation to matters of privilege and as long as there exists no *tribunal des conflits* to resolve these differences when they arise; and the highest

[38] A meaning, now obsolete, stated by the Oxford English Dictionary to have been in use in 1690.

courts may also err in law. If the jurisdiction of the courts in relation to a matter of privilege is wrongfully invoked, the House is no more obliged to stay its hand than is a court or statutory tribunal invested with exclusive jurisdiction over a class of issue when one of the parties brings an action in the High Court in an attempt to have the issue determined there.[39] In any event, in exercising its privilege the House will show restraint, particularly where in its opinion the judge has himself committed a technical breach of privilege.

None the less, these arguments are hardly compelling, and the doubts persist.[40] Moreover it is thought that the vital interest of both Houses and their members, and of the community as a whole, in the maintenance of the fullest freedom of expression in parliamentary proceedings, is well safeguarded in so far as the defence of absolute privilege precludes the bringing of successful actions or prosecutions for defamation in respect of statements made in such proceedings and equally efficacious defences preclude the bringing of successful prosecutions for other offences alleged to have been committed by virtue of such statements. It is not easy to see what useful public purpose is served by an assertion that the institution of such proceedings is a breach of parliamentary privilege. A person who is ignorant or stupid enough to institute proceedings that are clearly bound to fail is unlikely to be aware that he may be in breach of parliamentary privilege. Legal sanctions already exist against the litigious crank and the malicious prosecutor. The deterrent constituted by the threat of being adjudged guilty of breach of privilege and being subjected to humiliating and disagreeable sanctions is likely to be effective only against those persons (together with their legal advisers [41]) who honestly believe that they have been defamed on an occasion not protected by privilege but who apprehend that if they were to institute legal proceedings they might be held by the House to be guilty of a breach of its privileges even before the matter came to trial. And public confidence in determinations made by the House in relation to questions of law affecting the rights of individuals outside the House is not enhanced by the knowledge that in investigating complaints of breach of privilege its Committee of Privileges does not necessarily examine

[39] One answer to this argument is that the claim made by the House goes far beyond a mere assertion that it is entitled to proceed with the determination of a matter assigned exclusively to it. For it claims the right to penalise a person for indirectly questioning what it claims to be its exclusive jurisdiction before a court which is under a legal duty to determine whether, as a matter of law, the House has exclusive jurisdiction.

[40] Perhaps the proposition that would command the most widespread acceptance would be that the House could properly proceed against a plaintiff or prosecutor for breach of its privileges after the courts had determined that the defendant's conduct was protected by Article 9. But this proposition also can be contested.

[41] *Cf.* the letter by the Chairman of the General Council of the Bar and the President of the Law Society, *The Times*, July 3, 1958, p. 11.

as witnesses those individuals whose rights are in issue [42] and that it does not normally allow witnesses before it to be legally represented.[43]

THE ACT OF 1770

In presenting the address praying for a special reference to the Judicial Committee on the effect of the Parliamentary Privilege Act, 1770, the Commons were undoubtedly acting on the assumption that unless that Act had effected a partial or total repeal of Article 9 of the Bill of Rights they would be justified in treating the issue of a writ against a member in respect of a proceeding by him in Parliament as a breach of privilege. But the Judicial Committee was not asked to express an opinion whether this implied assumption was well founded, and made it clear that it was abstaining from doing so.[44] It was careful to limit itself to answering the question whether the House would be acting contrary to the Act of 1770 if it treated such a matter as a breach of privilege; and although certain passages in its opinion might be referred to in support of one or other of the contentions already discussed,[45] they must be read in the light of its avowed intention not to pronounce on any other question of law.

The Act of 1770 was the last of a series of four Acts—the others were passed in 1700,[46] 1703 [47] and 1737 [48]—that were designed to abridge and finally to abolish the privilege against being impleaded that members of both Houses had claimed for themselves and their servants. This privilege, which was first unequivocally asserted in the reign of Edward II,[49] originally rested on the principle that

[42] In the case under discussion no member of the London Electricity Board or of their firm of solicitors was called before the Committee of Privileges. Mr. Strauss was examined for a minute or two; the only other witness called was the Clerk of the House of Commons, who submitted a memorandum to the Committee.

[43] Though it has power to permit such representation and has occasionally used that power: Erskine May, *op. cit.* (16th ed.) 139. In the present case the Attorney-General, Sir Reginald Manningham-Buller, was a member of the Committee. On two of the main legal issues raised by the case he found himself in a minority of one, but on one of these issues his opinion was endorsed by the House.

[44] *Re Parliamentary Privilege Act, 1770* [1958] A.C. 331 at 353.

[45] A passage at the top of p. 350 appears to support the view that the bringing of an action for defamation in respect of a speech in Parliament could properly be regarded as a breach of parliamentary privilege; but this is offset by other passages at p. 353 of the report, particularly by the reference to "the inalienable right of Her Majesty's subjects to have recourse to her courts of law for the remedy of their wrongs," and also by the references at p. 354 to the unresolved dualism between the views of privilege entertained by the courts and the House of Commons.

[46] 12 & 13 Will. 3, c. 3.

[47] 2 & 3 Anne, c. 18.

[48] Parliamentary Privilege Act, 1737 (11 Geo. 2, c. 24).

[49] Hatsell, *Precedents of Proceedings in the House of Commons* (1818 ed.), i, 7–8. No further instances appear until the reign of Edward IV (*ibid.*, 39–43, 48–51), and they are almost absent under the Tudors (*ibid.*, 123–125). Under James I assertions of the privilege became far more frequent (*ibid.*, 176, *et seq.*).

persons attending Parliament should be free from molestation—a principle that now finds its primary expression in the privilege of freedom from arrest in civil matters. The method of withdrawing a suit from the courts on the ground of privilege was by the issue of a writ of *supersedeas* out of the Chancery, upon the receipt of which a court was obliged to stay its hand.[50] But although the courts could proceed no further when a *supersedeas* had been received, it was doubtful how far the privilege against being impleaded was well founded; and in *Benyon* v. *Evelyn* (1664) it was held, after a full review of the authorities, that "to file an original against a member of Parliament, *sedente Parliamento*, is lawful, and not against the privilege of Parliament."[51] Nevertheless, each House continued to assert the privilege, and in the eighteenth century it was grossly abused by members in order to prevent their creditors from instituting or continuing actions for debt against them. This abuse was coupled with the still greater abuse of treating private civil wrongs committed by members of the public against members of either House and their servants as breaches of parliamentary privilege.

The Acts of 1700, 1703 and 1737 restricted the classes of proceedings and persons covered by the privilege and the times during which it was exercisable. Ultimately the 1770 Act was passed[52] to take away the privilege. Its preamble recited that the laws previously made for limiting the privilege of Parliament with respect to actions commenced and prosecuted when Parliament was not sitting had not been sufficient to obviate the delay of suits, whereby the parties had often lost the benefit of several terms. It went on to enact that "any person . . . may, at any time, commence and prosecute any action or suit in any court" against any member of the Lords or Commons or any of their servants, or any other person entitled to a parliamentary privilege, and that "no such action, suit or any process or proceeding thereupon, shall at any time be impeached, stayed or delayed, by or under colour or pretence of any privilege of Parliament." The privilege of members relating to freedom of arrest was expressly saved.

[50] Under James I the Commons adopted the practice of ordering a letter to be issued under the Speaker's hand for stay of trial. The courts were generally acquiescent, doubtless for fear of the authority of the Commons (Hatsell, *op. cit.*, i, 187), but in *Hodges* v. *Moor* (1626) Latch 15, 48, 150 a court held that it was contrary to the judges' oath to stay proceedings on receipt of such a letter; nothing less than a writ of *supersedeas* would suffice.

[51] O.Bridg. 324 at 333; approved by Holt C.J. in *R.* v. *Paty* (1704) 2 Ld.Raym. 1105 at 1113–1114.

[52] For the immediate background to the Act, see Porrit, *The Unreformed House of Commons*, i, 567–571; Holdsworth, *History of English Law*, x, 545, *et seq.*; Cobbett's *Parliamentary History*, xvi, 974; *Parliamentary Debates*, 1768–71, 191; Lecky, *History of England*, iii, 226–227; May, *Constitutional History of England*, ii, 73–74; *Stockdale* v. *Hansard* (1839) 9 A. & E. at 115–116, 123–124. Compare also the first edition of Blackstone's *Commentaries* (i, 160–161) with the fifth edition, published after the 1770 Act (i, 165).

This unfortunately worded Act was capable of bearing at least three distinct interpretations [53]: (i) that it repealed by implication such substantive privileges as were embodied in Article 9 of the Bill of Rights; (ii) that it left intact the substantive privileges embodied in Article 9, but took away the privilege against being impleaded at any time and in respect of every class of matter, including those matters covered by Article 9; (iii) that it referred only to the bringing of actions against members in their private capacities and had no effect whatsoever on such privileges as were embodied in Article 9. The Judicial Committee rejected the first and second interpretations [54] in favour of the third. It arrived at this conclusion, which involved a limitation of the literal meaning of the general words used in the Act, by applying the mischief rule (though not *eo nomine*) and construing the Act of 1700, which was closely linked with the 1770 Act but more clearly expressive of Parliament's intentions than the later Act [55] and nearer in point of time to the Bill of Rights. Unless the generality of the words used in the 1700 Act was to be cut down they would have the effect of abrogating or vitally impairing Article 9 of the Bill of Rights—a conclusion which could not lightly be reached. It may be observed, however, that passages in the 1700 Act which materially assisted the Judicial Committee in arriving at its answer to the question referred to it were not reproduced in the Act of 1770.[56]

Proceedings in Parliament

When the House of Commons came to consider the opinion of the Judicial Committee and the reports of the Committee of Privileges there was no disposition on the part of members to question the correctness of the Judicial Committee's views on the effect of the 1770 Act; and most of the members taking part in the debate were content to assume with the Committee of Privileges that if Mr. Strauss's letter to the Minister was part of a proceeding in Parliament, the House would be entitled to treat the threat to issue a writ against him as a breach of its privileges. The question in issue was, in essence, whether Mr. Strauss's letter could be said to fall within the ambit or the protection afforded by Article 9. The House was reminded that it was not open to it to create new

[53] The number may be increased if variant assumptions are made about the true interpretation of Article 9 of the Bill of Rights. Moreover, the interpretations listed are based on the assumption that the 1770 Act altered the law and did not merely declare existing law.

[54] The Judicial Committee was assisted by arguments addressed to it by the Attorney-General, supporting an affirmative answer to the question referred, by Sir Frank Soskice, Q.C., on behalf of the Treasury Solicitor, supporting a negative answer to the question, and by Mr. Gerald Gardiner, Q.C., on behalf of the London Electricity Board, supporting an affirmative answer.

[55] Contemporary accounts of the parliamentary debates on the 1770 Bill are too selective to be of real value, but no reference has been traced to any supposed connection between the measure and the Bill of Rights.

[56] See esp. the passage referred to in the second paragraph of p. 350.

privileges for itself by extending its existing privileges,[57] but that an existing privilege might properly be interpreted as applying to new situations. In their task of interpretation the House had little authoritative guidance.

The immediate historical origins of Article 9 are clear enough. The article was directly related to the assertion in the Declaration of Right, 1688, that James II had violated the laws by "prosecutions in the Court of King's Bench, for matters and causes cognisable only in Parliament . . ." The only recorded instance of such a prosecution in James II's reign was that of Sir William Williams, Speaker of the House of Commons. In 1684 the Attorney-General had filed an information against him for criminal libel on the ground that, in the House of Commons and in pursuance of a resolution of the House, he had ordered to be printed and published a document defamatory of James, then Duke of York. In James's reign Williams was convicted and fined for the offence. Dangerfield, the author and publisher of the document, was also convicted.[58] The modern view is that the conviction of Williams was improper but that the conviction of Dangerfield was proper, inasmuch as Williams's order was a proceeding in Parliament, whereas Dangerfield's publication of the libel was an act done out of Parliament in pursuance of an order made by the House to do what was unlawful.[59] That the mention of "proceedings in Parliament" in Article 9 was designed specifically to cover the type of act for which Williams was prosecuted is amply demonstrated by contemporary evidence.[60]

The meaning of the phrase "proceedings in Parliament" has seldom been directly considered by the courts,[61] but essentially the same question has arisen before them in a variety of contexts. Thus, the courts have recognised that each House has exclusive control over its own internal affairs, so that a decision by the House of Commons that a person duly elected as a member is not legally qualified to take his seat cannot be questioned in the courts.[62] Not every act done or word uttered in Parliament, however, falls within the exclusive jurisdiction of the two Houses. Criminal offences consisting of acts done within the precincts of either House

[57] *Cf.* Erskine May, *op. cit.* (16th ed.), 47.

[58] *R.* v. *Dangerfield* (1688) 3 Mod. 68. When the convicted defendant was returning from Tyburn, after having been whipped to there from Newgate, he was murdered by a Mr. Frances, a barrister, who was later hanged for the crime.

[59] See *Stockdale* v. *Hansard* (1839) 9 A. & E. 1 at 124–126, *per* Lord Denman C.J.

[60] See note to (1695) 13 St.Tr. 1370; extracts from the Commons Journals collected in the report of a Select Committee of the House in 1771 (Committee Reports, iii, 11) and reproduced in C.J. (1810) 731; and Grey's *Commons Debates*, ix, 81.

[61] But see *Stockdale* v. *Hansard* (*supra*) at 124–126, 184–185, 232–233.

[62] *Bradlaugh* v. *Gossett* (1884) 12 Q.B.D. 271. For a wide interpretation of the internal affairs of the House, see *R.* v. *Graham-Campbell, ex p. Herbert* [1935] 1 K.B. 594.

appear to be, in general, cognizable by the courts.[63] Defamatory statements made by one member to another in the course of private conversation in the precincts of the House,[64] or contained in a letter posted by a member of the public to an M.P. in the precincts of the House,[65] are not protected by the absolute privilege that attaches to proceedings in Parliament. On the other hand, a transaction that takes place wholly or partly outside the precincts of Parliament may be so closely related to a proceeding within its precincts as to form part of it and so to fall within the ambit of Article 9. In *Ex p. Wason*[66] it was held that a magistrate was right in refusing to issue an information against two peers and another person for conspiracy to deceive the House of Lords by false statements, although the conspiracy was presumably alleged to have been formed outside the precincts of the House. Again, the suggestion made by the Select Committee on the Official Secrets Act, 1939, that a member will be protected by privilege when he "sends to a Minister the draft of a question he is thinking of putting down or shows it to another member with a view to obtaining advice as to the propriety of putting it down or as to the manner in which it should be framed"[67] is likely to command general assent. And according to a very recent Speaker's ruling a letter written by a member to a Minister at the latter's request to supply further information in connection with a question already put down by that member on the Order Paper is also protected.[68]

But this is not to say that every letter written or passed on by a member to a Minister in the general course of his parliamentary activities can reasonably be construed as forming part of proceedings in Parliament. The 1939 Committee leaned far in the direction of an unduly broad interpretation of the meaning of proceedings in Parliament when it referred with approval to a dictum by a Canadian provincial judge to the effect that a member was protected by privilege in respect of "anything he might say or do within the scope of his duties in the course of parliamentary business."[69] This dictum was in fact delivered in the course of a dissenting judgment,[70] and the relevant dicta in the American cases

[63] *Burdett* v. *Abbott* (1811) East 1 at 128; *Bradlaugh* v. *Gossett* (*supra*) at 283; but *cf. R.* v. *Graham-Campbell, ex p. Herbert* (*supra*).

[64] *Coffin* v. *Coffin* (1808) 4 Mass. 1, a decision of strong persuasive authority.

[65] *Rivlin* v. *Bilainkin* [1953] 1 Q.B. 485 (though the reasons given for the decision in this case were very brief). See further, on communications between members of the public and M.P.s, *Dickson* v. *Earl of Wilton* (1859) 1 F. & F. 419; *R.* v. *Rule* [1937] 2 K.B. 375.

[66] (1869) L.R. 4 Q.B. 573.

[67] H.C. 101 of 1938–39, para. 4. In actually giving notice of the question the member is undoubtedly protected: see *Gipps* v. *McElhone* (1881) 2 N.S.W.L.R. 18.

[68] 591 H.C.Deb. 809–813 (July 14, 1958).

[69] H.C. 101 of 1938–39, paras. 6, 7.

[70] *Per* O'Connor J. in *R.* v. *Bunting* (1885) 7 O.R. 524 at 563. In this case the majority of the Ontario Court of Appeal held (distinguishing *Ex p. Wason* (*supra*)) that an indictment for conspiracy to secure a change of government

cited by the Committee are, when viewed in their contexts, even less persuasive.[71] The 1957 Committee, in purporting to adopt and follow the arguments and reasoning of the 1939 Committee, leaned still further and arrived at the surprising conclusion that a member who writes a letter to a Minister criticising the administration of a nationalised industry is engaged in a proceeding in Parliament because "it is a reasonable possibility that he will seek an opportunity to debate the matter in the House" if he is dissatisfied with the answer he receives from the Minister or the appropriate authority.[72] This essay in liberal interpretation (which may have appeared to most members of the public, whose interests in the matter are not necessarily identical with those of members of Parliament, as illiberal interpretation) did not obtain the approval of the majority of the House. It would obviously be unreasonable to construe Article 9 as covering only those classes of matters that were recognised as proceedings in Parliament in 1689. It would also be unreasonable to insist that no transaction can form part of proceedings in Parliament unless it consists wholly of statements or questions that are published in *Hansard* or of acts performed in the debating chamber during a sitting of the House. But in determining whether such a transaction is part of proceedings in Parliament one should have regard not to mere reasonable possibilities but to the immediate intentions of the actor or actors and to the degree of proximity between that transaction and proceedings that are taking place or are about to take place or have just taken place in the House.

by bribing members of the provincial legislature was a matter cognizable by the ordinary courts and not in respect of a matter cognizable only by the legislature.

71 In *Coffin* v. *Coffin* (1808) 4 Mass. 1, where it was held that a defamatory statement made by one representative to another in private conversation in the debating chamber was *not* absolutely privileged, Parsons C.J. said *obiter* (at 27) that the privilege of freedom of speech and debate conferred by the Massachusetts Constitution extended to voting, the making of written reports "and to every other act resulting from the nature, and in the execution of, the office"; but the only illustrations he gave of such other acts (at 28) were the exercise of a representative's functions in a committee of the House sitting outside the Representatives' chamber and in a joint session of both Houses held in the Senate chamber. In *Kilbourn* v. *Thompson* (1880) 103 U.S. 168 the Supreme Court held that the U.S. House of Representatives had no power to commit for contempt, that the Serjeant at Arms was liable in damages for the execution of an order to commit for contempt, but that the members of the congressional committee who had given the order were not liable, having regard to the constitutional provision (Art. 1, s. 6) that "for any Speech or Debate in either House, they shall not be questioned in any other place." Miller J., delivering the opinion of the court, quoted with approval Parsons C.J.'s wide dictum in *Coffin's* case (*supra*) and added (at 204) that the constitutional provision extended "to things generally done in a session of the House by one of its members in relation to the business before it"; but his only illustrations were the presentation of written reports by committees, the submission of resolutions and the giving of votes. The other persuasive authority referred to by the 1939 and 1957 Committees was merely an unsuccessful argument of counsel in *Williams's* case (*ante*).

72 H.C. 305 of 1956–57, paras. 11, 12.

Several difficult problems remain outstanding. Will a member bring himself within the protection of Article 9 if, when addressing a complaint to the responsible Minister, he notifies the Minister that unless he receives a satisfactory reply he will put down a question on the Order Paper? If the complaint relates to the activities of a nationalised industry for which the Minister has general responsibility without being answerable at question time for matters of day-to-day administration, will it be enough to notify the Minister that in default of a satisfactory reply the member will seek to raise the matter in debate? If the answers to these questions are in the negative—and it is open to the House to build up its own case-law on these matters, although its interpretations will not, of course, be binding on the courts—would it not be appropriate to introduce amending legislation? The answer to this last question depends upon how far one considers the degree of legal protection at present accorded to M.P.s to conform with the requirements of public policy. There is no real doubt that a complaint addressed by an M.P. to a Minister or an appropriate public body on an issue of public concern, in the subject-matter of which the recipient has a sufficient interest, enjoys qualified privilege in the law of defamation; it is already settled law that qualified privilege attaches to statements as to alleged misconduct by persons holding positions of public authority made by members of the public to members of Parliament.[73] Qualified privilege can be rebutted by proof of malice; but does the public interest require that members of Parliament should be granted a new privilege to make malicious statements with impunity about persons who may as a result incur detriment without having had any opportunity to answer, or even to know of, the defamatory allegations? M.P.s who are inspired by proper motives have little or nothing to fear. How much evidence is there that members of local authorities have been incapacitated in the performance of their duty to investigate abuses by the fact that they too enjoy only qualified privilege? [74]

The policy arguments in favour of according absolute privilege to such communications are by no means insignificant. It is often the public duty of an M.P. to make defamatory allegations about individuals and public and private bodies. These allegations could be set down on the Order Paper in the form of parliamentary questions and would then be absolutely privileged; but this would sometimes be distasteful, and it is unlikely that the object of criticism would invariably welcome the opportunity to engage in a public controversy. Complaints conveyed in letters to Ministers are, indeed, often not merely a preliminary to but a substitute for parliamentary questions. And the constitutional relationship

[73] *Dickson* v. *Earl of Wilton* (1859) 1 F. & F. 419; *R.* v. *Rule* [1937] 2 K.B. 375. See also *Harrison* v. *Bush* (1855) 5 E. & B. 344 (memorial to Home Secretary calling for removal of magistrate).

[74] See letter to *The Times* by Mr. Herbert Morrison, July 15, 1958, p. 9. And see generally Gatley on *Libel and Slander* (4th ed.), 224 *et seq.*

between a Minister and the board administering a nationalised industry may be such that a question on the subject-matter of a complaint against the board would be disallowed, so that the only practicable method of drawing the Minister's attention to the matter will be by private communication with him. Again, if absolute privilege extends to communications between solicitor and client,[75] why should a corresponding privilege be denied to communications between M.P.s and Ministers? Moreover, although the non-malicious M.P. who had written a defamatory letter in the course of his duties could expect to succeed in his defence of qualified privilege, he could not feel completely confident of doing so, and he would in any event have to endure the vexation and expense attendant upon litigation. Finally, M.P.s not infrequently receive letters from constituents and other members of the public containing defamatory allegations which they deem it their duty to pass on to the responsible Minister, and it would be imposing an intolerable burden on them to expect them to carry out a preliminary investigation into the complainant's private motives in every case.

This last argument has a good deal of substance, and it suggests a possible line of approach to a satisfactory solution. On balance, it does not appear unreasonable to expect M.P.s to face up to the few hazards that beset persons who are protected by qualified privilege, in so far as this defence relates to complaints initiated by themselves or adopted by them as their own on the basis of information supplied by others. Their lot could no doubt be ameliorated by minor changes in parliamentary procedure and practice, and it would perhaps be desirable to reconsider the present methods of securing parliamentary superintendence over the activities of nationalised industries. The financial risks arising from the possibility of being made defendants in groundless actions could be covered by policies of insurance. On the other hand, it would seem to be unjust for an M.P. who merely passes on to the responsible authority an apparently bona fide complaint received by him to be infected with the unsuspected malice of his informant. Whether, under the present law, he would necessarily become thus infected is not at all clear[76]; but it would be appropriate to dispel that doubt by legislation. Legislation making it plain that the informant's motives

[75] The Court of Appeal has held that such communications do enjoy absolute privilege (*More* v. *Weaver* [1928] K.B. 520), but doubts have been thrown on this proposition by dicta in the House of Lords: see *Minter* v. *Priest* [1930] A.C. 558 at 574, 586.

[76] *Semble* the malice of one joint publisher of a defamatory statement infects all the other publishers (*Smith* v. *Streatfeild* [1913] 3 K.B. 764), but it is doubtful whether the same principle applies where the publisher is acting in a capacity distinct from that of the malicious author (see *Longdon-Griffiths* v. *Smith* [1951] 1 K.B. 295; Gatley, *op. cit.* (4th ed.), 213, n. 5), though the publisher would not be able to plead the statutory defence of unintentional defamation (Defamation Act, 1952, s. 4 (1) (*b*), (6)). In a statement made on July 30, 1958, Mr. R. A. Butler, the Leader of the House, said that he had been advised that a member forwarding a constituent's allegations would be protected provided that he had himself acted in good faith (592 H.C.Deb. 1370).

would not automatically be imputed to the member need not inevitably have the effect of absolving the member from responsibility in all circumstances; failure to make any reasonable antecedent inquiry into certain types of allegations might be construed as evidence of malice on the member's part.

If it is decided to introduce legislation that will have the effect of enlarging, directly or indirectly, the immunities and defences available to members of Parliament in respect of legal proceedings,[77] it is devoutly to be hoped that it will not be couched in language that is capable of being construed as rendering the erroneous institution of such proceedings a breach of parliamentary privilege. There is a wide difference between the proposition that members of Parliament must be endowed with far-reaching legal immunities and defences in virtue of their capacity and functions as members and the proposition that in any particular case either House may properly treat the bringing of legal proceedings against a member who is, according to its own interpretation of the law, entitled to such immunities and defences, as a breach of its own privileges. The privileges of Parliament are those rights which are "absolutely necessary for the due execution of its powers."[78] To assert a claim to a privilege to penalise members of the community who seek to have recourse to the courts of law for the rectification of their supposed wrongs is neither necessary nor desirable.

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[77] It would appear that the present Government has no immediate intention of introducing such legislation; see 592 H.C.Deb. 1373.

[78] Hatsell, *op. cit.*, i, 1, a passage adopted by Erskine May, *op. cit.* (16th ed.), 42.

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MALICE IN THE LAW OF TORTS

I

Mr. Justice McCardie once complained about the word "malice" that it had been the subject of "a regrettable exuberance of definition." [1] There can be little doubt that this complaint was justified. Despite the well-known division and discussion by Bayley J. of "malice in fact" and "malice in law," [2] which can be taken as the starting point of modern analysis of malice, other judges have not hesitated to enlarge upon the possible meanings of malice, until it seems that there must be judicial authority for any or almost any meaning that a writer wishes to attribute to the word. However, these various interpretations can be grouped under four main headings: (1) spite or ill-will; (2) any improper motive; (3) the intent to do a wrongful act; (4) the intent to inflict injury without just cause or excuse.

The use of "malice" to mean spite or ill-will is early. It is quite clear that in this sense the word is being used colloquially, not as a term of art. "Malice in common acceptance," said Parker C.J. in 1713 [3] "is a desire of revenge or settled anger against a particular person." A hundred years later, in a famous passage in *Bromage* v. *Prosser*, Bayley J. called this "malice in fact" and said it meant "ill-will against a person." The effect of later authorities was summed up by McCardie J.'s expression "vindictive feeling." [4] When used in this sense, therefore, malice involved the desire to satisfy a personal grudge and thereby to benefit the person who acted from malice.

But the older idea of vengeance, which as just seen involved at least emotional benefit to the malicious person, tended in the latter part of the nineteenth century to become absorbed in a broader notion of any motive which was regarded as undesirable by the courts of approval and encouragement. As a result, "malice" came to mean any improper motive. To quote McCardie J. once again, "the jurist . . . enlarged the layman's notion of malice." [5] Thus in 1853 [6] it was said that there was "express malice" where a party animated by a desire for vengeance *or other bad passion*, chooses to inflict injury on another person. Lord Campbell [7] spoke

[1] *Br. Rly. Traffic and Electric Co., Ltd.* v. *C. R. C. Co., Ltd.* [1922] 2 K.B. 260 at p. 268.
[2] *Bromage* v. *Prosser* (1825) 4 B. & C. 247.
[3] *Jones* v. *Givin* (1713) Gilb. 185.
[4] *Pratt* v. *B. M. A.* [1919] 1 K.B. 244 at pp. 275–276.
[5] *Ibid.*
[6] *Re Nolan* (1853) 22 L.T. (o.s.) 108.
[7] *Dickson* v. *Earl of Wilton* (1859) 1 F. & F. 419 at p. 427.

of "any indirect motive, other than a sense of duty"; Erle C.J.[8] of "corrupt motive or any departure from duty"; Crompton J.[9] of "any improper motive," and rejected the idea that malice meant "merely spite." Coming to more modern times, in *Balden* v. *Shorter* [10] Maugham J. called malice "some dishonest or otherwise improper motive," which statement was approved and adopted by Harman J. in *Loudon* v. *Ryder* (*No.* 2).[11] It seems clear that when malice was given this meaning it referred not to any desire to benefit the malicious person, however indirectly, but to the desire to inflict injury merely for the sake of inflicting such injury. Hence Evatt J.'s statement [12] that malice meant "disinterested malevolence" and the definition given by Holmes J. in 1894 [13] that malice meant "a malevolent motive for action without reference to any hope of a remoter benefit to oneself to be accomplished by the intended harm to another." This is a very different idea from the simple notion of spite or ill-will which was what malice meant for Parker C.J. and Bayley J. Yet it is not what they understood by "malice in law," even though some judges in the nineteenth century, for example, Baron Bramwell in *Melia* v. *Neate*,[14] seem to have suggested that "malice in law" meant some kind of disinterested malevolence. The confusion, it is suggested, results from the fact that in a sense this meaning of malice is an artificial meaning adopted by the courts for the purpose of law; but it is not the same as what may be described as the *technical* meaning of malice, to which Parker C.J. and Bayley J. gave the name "malice in law."

One of the meanings given to "malice in law" is the intent to do a wrongful act.[15] Though this looks at first sight more like a connotation used in criminal law, rather than the law of torts, it finds its way into cases of tort. Perhaps the most famous description of malice in this sense is contained in the judgment of Bowen L.J. in the *Mogul* case.[16] There he said that "maliciously . . . means and implies an intention to do an act which is wrongful to the detriment of another. . . . The term 'wrongful' imports in its turn the infringement of some right." But a second look at this description reveals that it is too full of words which themselves

[8] *Hibbs* v. *Wilkinson* (1859) 1 F. & F. 608 at p. 610; *Turnbull* v. *Bird* (1861) 2 F. & F. 508 at p. 524.

[9] *Hall* v. *Semple* (1862) 3 F. & F. 337 at p. 357. *Cf.* also *Clark* v. *Molyneux* (1877) 3 Q.B.D. 237 at p. 247 ("any wrong feeling in a man's mind").

[10] [1933] Ch. 427.

[11] [1953] Ch. 423.

[12] *McKernan* v. *Fraser* (1931) 46 C.L.R. 343 at p. 398.

[13] "Privilege, Malice and Intent," 8 H.L.R. 1, reprinted in *Selected Essays on the Law of Tort*, 162, at p. 163.

[14] (1863) 3 F. & F. at p. 763: he called malice "in law" any undue or indirect object.

[15] Rawson's Law Lexicon (1883) at p. 199.

[16] (1890) 23 Q.B.D. 598 at p. 612; *cf.* Lord Campbell "a conscious violation of the law to the prejudice of another" (9 C. & F. 321) and Lord Lindley in *South Wales Miners' Federation* v. *Glamorgan Coal Co., Ltd.* [1905] A.C. 239 at p. 258.

require further analysis to be satisfactory. Indeed there is a much more frequently met definition of "malice in law," at least for the purposes of the law of torts.

This is the description of malice as the intent to inflict injury without just cause or excuse. Parker C.J. in *Jones* v. *Givin* said nothing about intention, but did say that malice as a term of law always excluded a just cause. It was Bayley J.[17] who introduced the notion of intention when he called malice in law "a wrongful act done intentionally without just cause or excuse," a phrase which as we shall see bristles with problems. But the language of Bayley J. was repeated or echoed throughout the nineteenth century [18] and still seems to be favoured by the courts. Thus in *Re Nolan* [19] in 1853 malice was described as "where a party in full possession of his faculties . . . chooses to commit injuries upon another without reasonable cause." The use of the word "reasonable" is an interesting variant, although sometimes it has been said that malice and lack of reasonable cause are the same thing. But this must be a proposition of doubtful validity, at least in respect of the tort of malicious prosecution if nowhere else, though it can be said that lack of reasonable cause for a prosecution may well evidence malice. However the statement in *Re Nolan* illustrates how flexible the idea of malice in law became after Bayley J. However, his words were not forgotten, nor were those of Parker C.J. Collins M.R. in *Read's* case [20] said that the action of the defendant in inducing a breach of contract by a combination to coerce X into dismissing the plaintiff because he was not a member of the defendant's society was malicious or, he went on, "if the phrase be preferred 'without just cause or excuse'." Later in his judgment he talked of "what might in given circumstances be 'just cause' or in other words suffice to negate malice." More recently, in *Jones* v. *Motor Surveys Ltd.*,[21] Roxburgh J. referred to malice as the "wilful and intentional doing of damage without just cause or excuse"; and in 1955 the Court of Appeal [22] quoted with approval the words of Bayley J. and went on to say that "intentionally" in Bayley J.'s definition referred to the doing of the act; it did not mean that the defendant meant to be spiteful, though sometimes, as for instance to rebut a plea of privilege in defamation, malice in fact had to be proved.

After such a multiplicity of citations it is obvious that the subject of malice is complex. Perhaps the first comment that

17 *Bromage* v. *Prosser*, *supra*, n. 2.

18 *e.g.*, by Littledale J. in *M'Pherson* v. *Daniels* (1829) 10 B. & C. 263 at p. 272; Martin B. in *Johnson* v. *Emerson* (1871) L.R. 6 Ex. 329 at p. 373. *Cf.* also Lindley L.J. in *Stuart* v. *Bell* [1891] 2 Q.B. 341 at p. 351: "every unjustifiable intention to inflict injury."

19 (1853) 22 L.T. (o.s.) 108.

20 *Read* v. *Friendly Society of Operative Stonemasons* [1902] 2 K.B. 732 at p. 738.

21 [1948] Ch. 252.

22 *Jones Bros.* v. *Stevens* [1955] 1 Q.B. 275 at p. 280.

should be made is that the law has developed so far from the elementary principles of the early nineteenth century that it has outgrown the old dichotomy initiated by Parker C.J. and Bayley J. between malice in fact and malice in law. Though at first sight the phrases have the attraction of simplicity and easy application, it must be clear from what has been said above that their apparent simplicity is a snare and leads to confusion. A different analysis is required in the light of modern cases, which, while repeating the old formulae, are really invoking them for new uses, which in turn require new expressions. The division I should like to suggest is between "improper motive" and "wrongful and unjustified intention." Both these ideas have evolved from the analysis of Parker C.J. and Bayley J.; but they go beyond it. What they involve must now be considered.

II

In the first place there is the notion of "improper motive" which replaces the old idea of "malice in fact." In determining that X has behaved "maliciously" in this sense a court is really saying that X's actions are what Judge Ormsby called, sixty-five years ago,[23] "morally reprehensible." Deciding such an issue does not of itself conclude any legal issue; for it remains to be seen whether a "morally reprehensible" act is also an unlawful, *i.e.*, tortious one. In this way questions of *motive*, which involve moral issues, come into the law of torts. "Malice in fact," even in the attenuated meaning given by Bayley J., involved considerations of motives and this was certainly true of later elaborations of Bayley J.'s expression. Hence Lord Collins's remarks[24] that "without just cause or excuse" was not an equivalent of what the common law understood by malice, and that it would not be possible, in civil actions any more than criminal, to eliminate motives from the discussion. In fact, both in criminal law and the law of torts, the courts have frequently determined issues on the basis of morals, despite judicial assertions to the contrary. This has been pointed out by more than one writer, particularly in America, where considerable effort has been made to elaborate some general theory of "malice" which took account of motives.[25] The "antiquated view" as Prosser calls it,[26] that malice, in the sense of motive, is irrelevant to tort liability, if it was correct in the time of Judge Ormsby, whose opinions Prosser was criticising, is certainly not true today. Recent developments, which will be discussed below, only emphasise the need for some general approach to the question based upon the recognition of the importance of motive.

[23] "Malice in the law of Torts" (1892) 8 L.Q.R. 140.
[24] In *Read's* case, *supra*, n. 20.
[25] See, *e.g.*, Ames, "Tort because of a Wrongful Motive" (1905) 18 H.L.R. 411; Holmes, "Privilege, Malice and Intent" (1894) 8 H.L.R. 1; Terry, "Malicious Torts" (1904) 20 L.Q.R. 10.
[26] Prosser on *Torts* (2nd ed., 1955) at p. 21, n. 58.

Secondly, the idea of "intent to inflict injury without just cause or excuse" has undergone development which makes the expression "malice in law" archaic and unsatisfactory, and suggests that an expression such as "wrongful and unjustified intention" would be more helpful. The basic notion, it is true, can still be found in Lord Bowen's famous phrase [27] which speaks of the intentional doing without just cause or excuse of what is calculated to damage. This indicates (1) that the theoretical basis of liability is *intention*, not motive (nor, it may be added, negligence), and (2) that there may be some instances in which the law, if it does not encourage at least does not penalise the intentional infliction of injury. But there is more to be discussed; for it is left to the courts to determine the division between such instances and others, to decide what is and what is not "just cause or excuse"; and this dividing line has so changed its position and shape in the last fifty to a hundred years that the whole subject needs re-examination.

A preliminary point should be clarified at the very outset; this is the difference, in this context, between intention, which I take to refer to immediate ends or purposes, and motive, which I take to refer to ends or purposes beyond the immediately obvious. "Intention" as used by the courts, is really an originally unsophisticated notion of law, probably introduced when the law, especially the criminal law, was too crude to be able easily to differentiate between motives in order to determine liability, and when the law of evidence was so rudimentary, for example by excluding evidence of the parties in civil actions and the accused in crime, that it was difficult to prove states of mind. At such a period in the history of English law it was easier to look at what X had done and infer from it (if necessary by use of the doctrine of "natural and probable consequences") what had been the immediate end or purpose he desired to achieve, and then to say that X "intended" a certain result. Motive, being a subtler and more difficult notion, enters into the consideration of liability later on. Hence, possibly, it is not until late in the nineteenth century that it began to figure prominently in judgments; and it is not without relevance that it does so after the law has been changed so that parties in civil actions can give evidence, after which time comes Lord Bowen's famous remark [28] that "the state of a man's mind is as much a fact as the state of his digestion." When this stage was reached it became possible to inquire into the *ultimate* ends or purposes of acts intended by X. And so motive becomes more important at the end of the nineteenth century. However, there still can be found in cases in the early twentieth century, particularly those concerning interference with contractual relationships, language which suggests that motive is irrelevant to the determination of liability. This seems to have been stated as law

[27] *Mogul S.S. Co.* v. *McGregor, Gow & Co.* (1889) 23 Q.B.D. 598 at p. 613.
[28] *Edington* v. *Fitzmaurice* (1885) 29 Ch.D. 459 at p. 483.

first in *Lumley* v. *Gye*,[29] at a time when the analysis of Bayley J. and the later impressions of what "malice" meant were in the air, and as late as 1905 in the *South Wales* case [30] malice, in the sense of motive, was still excluded as an element of liability in such cases. But a year later [31] Lord Davey drew a distinction between the effects of a bona fide belief and "a malicious intention to spite and injure another without just cause." In 1915, in *Larkin* v. *Long* [32] Lord Atkinson spoke of people acting "maliciously," by which he seems to have meant from an improper motive; and it is suggested that in recent times, in respect of this tort and others like it, earlier dislike of testing liability by reference to motive has begun to give way to a realisation that, as Lord Collins said in *Read's* case, motive cannot be entirely eliminated from the discussion.

But here an important difference between motive and intention must be noted. Motive, where it was accepted in the nineteenth century as being relevant, was (and is) only one among several determining factors necessary for deciding that liability in tort exists. For example, in defamation or injurious falsehood, or malicious prosecution, and possibly in some instances of nuisance, a number of facts or conclusions have to be determined before it can be said that the defendant is liable. Motive is only *one* of these facts or conclusions. And it is a matter of *fact*. On the other hand, intention (in the sense in which that expression is being used in this essay) is a question of *law*. It is not just a factual element in the determination of liability: it is the essential legal element upon which turns the issue of liability. Thus where the law says that there is no just cause or excuse for intentionally inflicting harm, then there is tortious liability. By contrast, an improper motive for acting in a way which causes harm is not of itself and of necessity tortious. For the act which causes harm may not, as a matter of law, be regarded as a wrongful act. Thus, as will be seen further below, in the absence of an improper motive (*i.e.*, without the act in question being done maliciously), it is unlikely that there will be the intention to cause harm without just cause or excuse. But there may be an improper motive (*i.e.*, "malicious" conduct) without, *in law*, an intention to cause harm without just cause or excuse, and, therefore, without there being any liability. For example, claiming a debt, at an awkward time for the debtor, however maliciously done, and however harmful, is not tortious. Nor is maliciously but lawfully giving notice to a servant; nor maliciously prosecuting someone where there is "reasonable and probable cause" for the institution of proceedings (though malice

29 (1853) 2 E. & B. 216.
30 *South Wales Miners' Federation* v. *Glamorgan Coal Co., Ltd.* [1905] A.C. 239 at p. 246, *per* Lord Macnaghten.
31 *Denaby and Cadeby Main Collieries Ltd.* v. *Yorkshire Miners' Association* [1906] A.C. 384 at p. 400.
32 [1915] A.C. 814 at p. 826.

may negative such reasonable and probable cause); nor maliciously bringing a *civil* action against someone, however ill-founded the action be [33]; nor maliciously publishing a damaging but true statement about someone (though there may be criminal liability); nor maliciously expelling a boy from school when the expeller, *e.g.*, a headmaster, has the power to do so.[34] Whether acting maliciously in these or other cases that could be suggested *should* be tortious is a matter for debate: but at the moment the courts have not said that it is. They have restricted the operation of malice in this sense to certain well-known instances, though, as will be seen later, there are indications that they may be beginning to extend the operation of "improper motive."

Thus an important practical difference can be found between motive and intention. "Improper motive" is a question to be determined by consideration of the evidence, whereas "intention" (as here used) is an artificial or technical notion of law, which depends partly upon the subjective desires of the defendant, partly upon the objective policy of the law. "Intention" for our purposes is not merely "desire" or "aim": it is also the absence of legitimate excuse for action: intention as here used is really an elliptical way of saying "intending to cause harm without what the law considers to be just cause or excuse." Intention as interpreted by the courts can be considered an objective idea, dependent upon current conceptions of what is just and unjust, lawful and unlawful, whereas motive is subjective in that it turns upon the more shifting foundations of what individuals at any given time feel or think is desirable, particularly in social and economic questions. Hence for two reasons the courts in England at any rate (though in the United States, as Prosser points out,[35] the courts have not been so loth to investigate motives), have felt more inclined to base liability upon the objective notion of intention. In the first place, they were thus able to some extent to avoid entanglement with changing conceptions of what was desirable in economic relationships, particularly those involving trade unions; secondly, by the use of the test of intention they could exercise greater control over liability than by the use of the subjective test of motive which, at least until recent times, would have to be left to juries, upon whose ability to determine difficult questions of moral and legal policy English judges do not always seem to have placed great reliance.

However, the courts in the past have allowed motive to play some role in the determination of liability in tort. Apart from the well-known cases where motive is relevant as an ingredient in such liability it seems clear that motive is very relevant to determine

[33] Though there seem to be exceptional cases, *e.g.*, bankruptcy, or winding up petitions, in which such an action will lie: see *Quartz Hill Cons. Min. Co.* v. *Eyre* (1883) 11 Q.B.D. 674; Harper and James, *Law of Torts* (1956) Vol. 1 at p. 326.

[34] *Hunt* v. *Damon* (1930) 46 T.L.R. 579.

[35] Prosser on *Torts* at p. 22.

whether the necessary intention is present in some if not all cases. An improper motive can possibly prove the intention to inflict injury without just cause or excuse. Moreover, the motive of a party is indicative of whether the law does, or, in a matter that is *res integra*, whether the law should consider that such a party has acted with what amounts to "a wrongful and unjustified intention."

If this is accepted, and it will be discussed and illustrated in greater detail later in this essay, then it is possible to express the present importance and use of malice in the law of torts in this way:

(i) Malice as denoting "an improper motive" can be part of the plaintiff's original case, *e.g.*, in malicious prosecution.
(ii) Malice, *i.e.*, any improper motive, can be a reply to the defendant's defence, *e.g.*, in some instances of defamation.
(iii) Malice in the sense of "improper motive" can be used to evidence the existence of malice in the sense of "a wrongful and unjustified intention."

In cases (i) and (ii) malice only raises issues of fact: proof of malice of itself or in combination with proof of other facts concludes the legal issues. In case (ii) proof of improper motive still leaves open the legal question whether there is the relevant intention.

III

So long as the common law was concerned with injuries resulting from a direct or indirect physical contact with a person or his property, states of mind were not very important for the determination of liability. Even the development of negligence in the eighteenth century did not involve the consideration of the defendant's state of mind so much as the assessment of the legal quality of his acts or omissions in the light of how the jury thought a reasonable man would have behaved. However, the development of defamation and of similar actions, such as malicious prosecution, which were concerned with attacks on reputation and character rather than with financial loss, began to make it necessary for the courts to investigate the defendant's state of mind at the time he committed the acts complained of. Possibly the reason for this was the reluctance by the courts to impose liability for injury to something other than the safety of a person or his property without proof that there was a conscious and deliberate desire to inflict the harm in question. If this had not been done, then the courts would have had to allow actions more or less when the jury wished; the history of defamation in the eighteenth century shows how the courts reacted to such a possibility. Hence the search for some test whereby liability for harm caused to someone otherwise than by an attack upon his personal safety or the safety of his goods could be restricted. In this way, as a result of such search, it

became settled that certain acts, if accompanied by *malice* (which as already seen came to mean "an improper motive," or as McCardie J. put it at a later date,[36] "a motive which the law does not approve") gave rise to liability. However, the problem was to determine *which* acts if done maliciously should be regarded as unlawful. Out of this development in the importance of the idea of malice there arose another problem. Were there some acts which, because they caused injury to others, could result in liability without proof of malice?; or was malice essential to all forms of liability which did not rest upon either one of the older forms of action, such as trespass, or the more recently developed action on the case for negligence? To some extent, and in more modern terms, having regard to the abolition of the forms of action, this problem has still not been authoritatively settled.

There are instances in respect of which it is now clear that it is the defendant's act plus his malicious state of mind, his improper motive, that together give rise to liability. As eventually worked out by the courts these instances were really cases of the abuse of a legal power to act. Indeed, in one particular instance—defamation—the underlying juridical nature of such liability has been made explicit; for proof of "express malice," *i.e.*, improper motive, overcomes a plea of privilege or fair comment (which is akin in nature if not form to privilege): and such pleas are assertions of a legal power to act, which are therefore defeated by proof of abuse, *i.e.*, malice. For reasons of policy it was decided at various times by common law or statute that certain claims of privilege, *i.e.*, certain assertions of legal powers, could not be overcome by accusations of malice, however successful: they were absolute. Apart from defamation, the instances in which malice is relevant to liability have been so developed as to make it necessary for the plaintiff to plead and prove malice at the very outset of his case. But these differences in burden of proof are of no importance for the purpose of the present discussion. In all these kinds of liability, defamation, injurious falsehood, malicious prosecution, and nuisance (of which more will shortly be said) the plaintiff's claim is really one of "abusive use of rights," as it is sometimes called, but "abusive use of legal powers" as it should properly be called. But such language, as Planiol suggested,[37] is really logomachy. The very questions in issue are: what is an abusive use of legal powers? when does such an abusive use take place? The substitution of "malice" or "acting maliciously" is not very helpful. For since malice here means "an improper motive," the questions must still be asked: what is an improper motive?: when is a motive improper? These are the questions which have been asked, and in broad outline answered, in the many cases concerned with the torts mentioned above; and it is not my

[36] *Pratt* v. *B. M. A.* [1919] 1 K.B. 244 at p. 276.
[37] Quoted by Walton in 22 H.L.R. 501, at pp. 503–504.

purpose to discuss those answers in detail. The subject of discussion in this essay is not so much the detailed meaning of "malice" as the analysis and utility of the concept of malice and its place in the theory of torts.

In this respect it is worth mentioning the importance of malice (*i.e.*, motive) in nuisance.[38] For nuisance affords an important illustration of the way in which "improper motive" is related to the abusive use of legal powers and shows how cross-currents of judicial opinion about malice have caused considerable difficulty.

It is often said, on the basis of such authorities as *Mayor of Bradford* v. *Pickles*,[39] that "malice" is irrelevant to the determination of whether a defendant is guilty of nuisance. But, on the other hand, there are cases which seem to indicate that the defendant's motive is one test of whether he is guilty of nuisance. For, if it is accepted that liability for nuisance depends upon whether the defendant's use of his land was a "reasonable user" —which seems to be the law laid down by a number of authorities [40]—the defendant's motive is very relevant to determine whether his use was reasonable. The confusion about *Pickles's* case, it is suggested, results from forgetting the previous decision [41] by the House of Lords (for reasons which are not relevant here, but may not be altogether unconnected with the importance of landowning) that the taking of water in such circumstances was an absolute legal power, which therefore excluded the possibility of defeat by proof of malice. But where there is no clear decision in favour of saying that a certain course of conduct comes within the scope of an absolute legal power, then it is open to a court to decide that such power as the law permits an occupier of land to enjoy must be exercised reasonably: hence the exercise of such powers for an improper purpose is tortious, *i.e.*, a nuisance. That, it seems, is the explanation of such cases as *Christie* v. *Davey* [42] and *Hollywood Silver Fox Farm* v. *Emmett*.[43] The confusion about malice *à propos* nuisance has been caused by fluctuating views on what powers the law should allow occupiers of land; such fluctuation of opinions reflects the changes that have occurred in the general ideas of the community about the relations between occupiers of land whether *inter se* or in respect of non-occupiers. What is an abuse at one period is not at another; and vice versa; and in so far as the courts have not been forced to apply precedents strictly they have been free to give effect to the changes in current

[38] For a fuller discussion, see Fridman, "Motive in the English Law of Nuisance," 40 Virginia L.R. 583.

[39] [1895] A.C. 587.

[40] *Bamford* v. *Turnley* (1860) 3 B. & S. 62 at p. 84; *Gaunt* v. *Fynney* (1872) L.R. 8 Ch.App. 8; *Ball* v. *Ray* (1872) L.R. 8 Ch.App. 467; *Sanders-Clark* v. *Grosvenor Mansions Co., Ltd.* [1900] 2 Ch. 373.

[41] *Chasemore* v. *Richards* (1859) 7 H.L.C. 349

[42] [1893] 1 Ch. 316.

[43] [1936] 2 K.B. 468.

opinions about what occupiers should be permitted to do. This is no more mysterious, nor more unjustified, than what has happened in respect of liability for negligence. The difference lies chiefly in respect of the speed with which the courts have altered their opinions. Negligence, because of its greater immediate importance in the everyday business of the courts, has developed more quickly than liability for "improper motives." But such development has been taking place.

To such an extent is this true that it may well be that the utility of "improper motive" cannot be said to have been circumscribed by the previously existing case law. For just as torts such as defamation and malicious prosecution were developed in the nineteenth century by the use of "improper motive," so it may well be that in the twentieth century "new" torts, or, to put it for the moment more neutrally, new forms of liability, may be in the process of emerging by the same means. It was said earlier in this essay that the courts have not yet said that whenever and in all cases where a person causes harm from an improper motive he will be liable in tort for such harm. They have not yet got to the stage of saying that whenever a legal power is exercised for an improper motive it will create liability. Indeed, Lord Atkin once said that it was impossible for the law to prevent all oppressive exercise of legal rights.[44] But there are indications that the courts are gradually moving in that direction, albeit slowly.

Thus in the "wrongful expulsion from trade union" cases there are statements in judgments in this country [45] and Canada [46] that an action for wrongful expulsion, at least if brought against union officials or others instrumental in procuring such expulsion (for against the union itself an action for breach of contract is maintainable [47]), should be based on the improper motive of those procuring the expulsion. It seems also that improper motive is important in cases of excess of jurisdiction by statutory tribunals [48]; or exceeding powers of arrest [49]; or making a judgment ordering payment of money, as in the recent case of *O'Connor* v. *Isaacs*.[50] Professor Street [51] has denied the relevance of improper motive in cases of what he terms "abuse of statutory powers." But it is suggested that the point is at least an open one, and if there is anything similar here to the torts already discussed which are well-established instances of what might be termed the "abuse of

[44] *Ware & De Freville Ltd.* v. *M. T. A.* [1921] 3 K.B. 40 at p. 91.
[45] *e.g.*, *Abbott* v. *Sullivan* [1952] 1 K.B. 189 at p. 216 *per* Morris L.J.
[46] *Tunney* v. *Orchard* (1955) 3 D.L.R. 15 at p. 41 *per* Tritschler J.; but note the criticism of Rand J. in the Supreme Court of Canada: *Orchard* v. *Tunney* (1957) 8 D.L.R. (2d.) 273 at p. 280.
[47] *Bonsor* v. *Musicians' Union* [1956] A.C. 104.
[48] *Abbott* v. *Sullivan* [1952] 1 K.B. 189 at pp. 200–205 *per* Denning L.J..
[49] See the Australian case, *Trobridge* v. *Hardy* (1955) 94 C.L.R. 147.
[50] [1956] 2 Q.B. 288.
[51] *Law of Torts* pp. 371–374.

common law powers" there is a good deal to be said by way of argument in favour of making improper motive relevant to such instances of liability.

In this respect there is much to interest the private lawyer in the recent case of *Smith* v. *East Elloe Rural District Council*,[52] although thus far it seems only to have excited interest on the part of constitutional and administrative lawyers. The main point in the *East Elloe* case was whether judicial investigation of the validity of a compulsory purchase order made in respect of Mrs. Smith's house was barred by the provisions of paragraph 16 of Part IV of Schedule I to the Acquisition of Land (Authorisation Procedure) Act, 1946. But it was said in the House of Lords that Mrs. Smith's claim against the clerk of the council could nonetheless be brought despite the statutory bar to proceedings against the council itself and the Minister; and such claim was based on the ground that "the clerk knowingly acted wrongfully and in bad faith in procuring the order and its confirmation." It is difficult to see what Mrs. Smith's cause of action could have been unless it is regarded as a claim for the abuse of a statutory power for some improper motive, just as the expulsion of a person from a trade union may be wrongful in that it is the abuse of a common law power (*i.e.*, the power to expel a member) for some improper motive. In the course of a note on the case [53] Mr. H. W. R. Wade wrote that the House of Lords "did not elucidate the conclusion . . . that it was possible for an officer of the council to be liable in damages even though the order itself was valid. The conception itself is not an easy one, at any rate as applied to the appellant's claim which was for damages for trespass." But it was never decided whether the compulsory purchase order was valid; the decision was that it was unchallengeable—which may not amount to the same. Secondly, the appellant's claim against the clerk was *not* framed in trespass. She claimed in trespass against the *council*. In respect of the clerk the appellant claimed: "A declaration that he knowingly acted wrongfully and in bad faith in procuring the order or confirmation thereof" and damages. Unless it is suggested that the clerk was guilty of injurious falsehood, it is difficult to see what cause of action the appellant had apart from some general notion of abuse of right or rather of abuse of statutory powers, or privileges, for an improper motive. Yet Lord Simonds in the House of Lords suggested that she had a claim of some sort.[54]

These recent cases indicate that there is a growing conviction that acting from an improper motive should give rise to liability

[52] [1956] 2 W.L.R. 888.
[53] [1956] C.L.J. 145.
[54] [1956] 2 W.L.R. at p. 895; *cf.* Lord Morton, *ibid.*, at p. 897. From a report in *The Times* earlier this year of an appeal by Mrs. Smith to the Court of Appeal for trial by jury, it would appear that she is bringing an action against the clerk.

in tort in a greater number and variety of instances than were permitted in the nineteenth century. The scope of "malice" in this respect, at any rate, has been considerably widened.

But "malice" has become of even greater importance through the development of its other connotation, "a wrongful and unjustified intention."

IV

A convenient starting point for the discussion of the role of "wrongful intention" in the law of tort is Lord Bowen's famous statement in the *Mogul* case that there is a cause of action whenever one person intentionally causes damage to another without just cause or excuse. There can be little doubt that Lord Bowen went too far; his statement did not correctly represent the position of English law at the time he spoke; nor does it do so today, as Denning L.J. pointed out in *Abbott* v. *Sullivan*.[55] Were it true the difficulties seen above would not have arisen. Doubtful cases could have been decided on Lord Bowen's principle. But Lord Bowen's statement was not entirely unfounded. In the nineteenth century there were instances when intentionally inflicting injury without just cause or excuse (or in the present writer's phrase "acting with a wrongful and unjustified intention") did give rise to liability; and this is still true. Indeed the instances may well have multiplied. The problem here, as with "improper motive," has been that the courts have changed their minds about what is and what is not "wrongful" or "just cause or excuse." Rather than attempt to lay down any general principles they have been content to declare in individual instances whether what the defendant had intended was wrongful and unjustified, in the same way as they have been careful not to create any general idea of what is an improper motive. In this part of the law one of the main reasons, if not the main one, for this caution by the courts has been because in many of the instances in which wrongful and unjustified intention is the test of liability the law of tort has become what Prosser calls "a battlefield of the conflict between capital and labour, between business competitors and those who have conflicting claims in the economic struggle."[56] Onto that battlefield, courts in England have been reluctant to stray unless compelled. When they have entered that field they have taken care to limit their activities in it to what was absolutely essential, which, as with the parallel case of monopolies in the law of contract (where judicial avoidance of important issues led to the Restrictive Trade Practices Act), has compelled Parliament to intervene with a considerable amount of legislation regulating industrial life and providing for the settlement, and perhaps the avoidance, of industrial disputes.

[55] [1952] 1 K.B. 189.
[56] Prosser on *Torts* at p. 23.

But the courts could not entirely avoid deciding some cases of economic conflict; and in deciding such cases "wrongful and unjust intention" was the test they used. The early cases,[57] which involved *physical* acts of coercion or intimidation, could be dealt with without great difficulty. They could be looked upon as varieties of trespass. But in later cases [58] in which the coercion or intimidation took the form of *economic* interference, without physical manifestations, the simple rules of trespass were inapplicable; instead the more complex and subtle notions centring around the idea of intentional harm had to be used, just as in defamation and malicious prosecution more was required than the mere infliction of injury for liability to exist. Two important instances of liability illustrate the development; conspiracy, and inducing or procuring a breach of contract.

The growth of the tort of conspiracy from the *Mogul* case [59] to the *Veitch* case [60] does not have to be retold here. The important point for the purpose of this discussion is that the cases show how the courts had to create and nurture the flexible idea of "acting intentionally and without just cause or excuse." In the determination of when conspiracy was not actionable, through the operation of "just cause or excuse," two factors were relevant; first, the intention of the defendants, their state of mind. There has to be what the courts consider rightful, *i.e.*, one which the courts can and should protect, as well as one which the courts can regard as bona fide and not hypocritical. The second factor is whether, in the light of the social and economic conditions surrounding the circumstances, the combination is justified. If the first factor involves the courts in permitting or proscribing states of mind, the second involves them in determining what *acts* they should permit. The *Veitch* case, while making "wrongful and unjustified intention" the test, leaves it open to the courts to decide whether an intention is (a) wrongful and (b) unjustified, and seems to indicate that "improper motive" is relevant on *both* these issues.[61] Indeed, although there seems to be a valiant effort on the part of judges and jurists to exclude "improper motive" from any effective operation in this part of the law, I would respectfully suggest that there is an affinity here with the instances of liability considered in the previous section of this essay. In other words, though men have the legal power to combine, such power may only be exercised with a *rightful* and *justified* intention.

[57] *e.g.*, *Garret* v. *Taylor* (1620) Cro.Jac. 567; *Keeble* v. *Hickeringill* (1706) 11 East 574n.; *Tarleton* v. *McGawley* (1793) 1 Peake 270.

[58] *e.g.*, *Lumley* v. *Gye* (1853) 2 E. & B. 216; *Bowen* v. *Hall* (1881) Q.B.D. 333; *Temperton* v. *Russell* [1893] 1 Q.B. 715.

[59] *Mogul S.S. Co., Ltd.* v. *McGregor Gow & Co., Ltd.* [1892] A.C. 25.

[60] *Crofter Hand Woven Harris Tweed Co., Ltd.* v. *Veitch* [1942] A.C. 435.

[61] *e.g.*, [1942] A.C. 435 at p. 443 (Lord Simon); p. 452, Lord Maugham; pp. 468–471, Lord Wright. *Cf.* Hughes, "The Tort of Conspiracy" (1952) 15 M.L.R. 209 at p. 211.

But improper motive destroys the legality of the exercise of the power: for improper motive, in the language of the *Veitch* case, shows that the intention of the conspirators is not bona fide, which must mean here that their intention is not rightful and justified. It is difficult to see how else than by proof of improper motive it would be possible to show the necessary lack of bona fides which in turn would reveal that the conspiracy was entered into from a wrongful and unjustified intention; and the recent case of *Huntley* v. *Thornton*,[62] it is suggested, supports this view; for the spite, the personal grudge of certain of the defendants, *i.e.*, their improper motive, made them liable for conspiracy, whereas the desire to maintain union policy, a "proper motive" on the part of the other defendants, was a good defence.

Similar arguments, it is suggested, apply to the tort of interfering with contractual relations, which developed from *Lumley* v. *Gye*.[63] It is true that in that case it was said that "malice"—which seems to have been used in the sense of spite or ill-will—was irrelevant; it is true that some later cases have repeated this[64]: it is also true that the *intention* to procure a breach of contract, that is the knowledge of what one is doing, is the essential (apart from other points which do not arise here[65]). But, on the other hand, the courts have acknowledged that interference of this kind with contractual relations will not be actionable if it is not wrongful and unjustified. What determines these issues? Lord Lindley in *South Wales Miners' Federation* v. *Glamorgan Coal Co.*[66] referred to "an intention to commit an unlawful act without reference to spite or ill-feeling." But when is an act unlawful or wrongful? Some acts are clearly unlawful, or wrongful, or involve what Lord Watson in *Allen* v. *Flood*[67] categorised as "illegal means"; for example, the application of violence to persons,[68] the commission of a trespass to goods,[69] the use of fraud.[70] In such cases it may well be that the tort in question will not be inducing a breach of contract; liability can be founded on some other nominate tort. But where there is no such separate tort, where there is only persuasion or the application of "moral" pressure to produce a breach of contract, how are the courts to decide whether the acts are unlawful or wrongful, or the means are illegal, if not by the use of the test of "improper motive"? In other words, the power to persuade or influence others in respect of their contractual obligations is not to be exercised for an improper motive. If the restricted meaning

[62] [1957] 1 All E.R. 234.
[63] (1853) 2 E. & B. 216.
[64] *e.g.*, Lord Macnaghten in *Quinn* v. *Leathem* [1901] A.C. 495 at p. 510 and in the *South Wales Case* [1905] A.C. 239 at p. 246.
[65] *D. C. Thomson & Co.* v. *Deakin* [1952] Ch. 646.
[66] [1905] A.C. 239 at p. 255.
[67] [1898] A.C. 1 at p. 96.
[68] *Tarleton* v. *McGawley* (1793) 1 Peake 270.
[69] *G. W. K. Ltd.* v. *Dunlop Rubber Co.* (1926) 42 T.L.R. 376.
[70] *National Phonograph Co.* v. *Edison Bell Co.* [1908] 1 Ch. 335.

of malice (*i.e.*, spite or ill-will) is dropped, and the broader meaning of "improper motive" adopted, it becomes possible to solve some of the difficulties of this part of the law. Such an explanation of the approach to this form of liability is supported by a consideration of Lord Davey's undelivered but reported speech in *Denaby and Cadeby Main Collieries, Ltd.* v. *Yorkshire Miners' Association*,[71] the oft-approved judgment of Petersen J. in *Hodges* v. *Webb*,[72] and by cases such as *Allen* v. *Flood* itself (which, it is suggested, still leaves open the relevance of "improper motive"), *Ware and De Freville, Ltd.* v. *Motor Trades Association*[73] and *Brimelow* v. *Casson*.[74] In these cases the question was whether there was "just cause or excuse" for the inducement of the breach of contract and this is only another aspect of the idea of "wrongful intention."

V

These two instances of liability for a "wrongful and unjustified intention" were cited as illustrations: they are not put forward as the only instances of such liability. It may very well be that some of the examples of liability for "improper motive" discussed in an earlier section of this essay are struggling towards independent existence as torts of wrongful and unjustified intention. At the moment it is too early to say that the courts are prepared to recognise in the first place whether there exists an independent tort of intention (as Dean Wright has referred to it [75]), and secondly, if such a tort exists, whether the previously mentioned examples are instances of it. The present state of the law relating to malice may be compared with the state of the law of negligence before *Donoghue* v. *Stevenson*. We have at the present, first, instances where liability depends upon "malice" in the sense of "improper motive"; secondly instances where the independence of "wrongful and unjustified intention" as a basis of liability has been recognised; thirdly, the recognition that "wrongful and unjustified intention" is connected with, is indeed founded upon, the notion of "improper motive." [76]

For these reasons, it is suggested (although the suggestion is by no means novel) that the term "malice" with its suggestions of old controversies should be replaced by some similar terminology to that used in this essay. The ambiguity of "malice" like that of the word negligence, prevents the proper analysis of the kinds

71 [1906] A.C. 384 at p. 400, "a malicious intention to spite and injure another without just cause."
72 [1920] 2 Ch. 70.
73 [1921] 3 K.B. 40.
74 [1924] 1 Ch. 302. *Cf.* also the rule of "malice" (*i.e.*, improper motive) in enticement of a spouse: see the remarks of Denning L.J. in *Gottlieb* v. *Gleiser, The Times*, March 5, 1955, cited by Devlin J. in *Winchester* v. *Fleming* [1957] 3 W.L.R. 1023 at p. 1027, n. 3.
75 "The English Law of Torts," (1955) 11 University of Toronto L.J. 84 at p. 87.
76 See, *e.g.*, Lord Maugham in the *Veitch Case* [1942] A.C. 435 at p. 452.

of liability that have been discussed in the previous pages; and one result of faulty or impeded analysis is that development of the law is delayed and made more difficult. The old dichotomy between malice in fact and malice in law obscured rather than clarified the relationship between the two: and in a part of the law of torts where development is necessary and will become of greater importance in the future it is especially necessary to be able to analyse correctly.

It would seem today that the need for some kind of liability based upon the intention to cause harm has been realised and accepted by the courts; such acceptance, it is suggested, results from the development of society to a stage in which there is more scope for causing harm by acts which in themselves would not fall within the boundaries of earlier torts based upon committing physical assaults upon the person or property of others. Much more harm in these days can be caused by words of persuasion or encouragement, by speeches which end in resolutions and induce courses of action not in themselves amounting to trespasses, by using far-reaching statutory powers for perverted and undesigned ends. To cope with such instances the older kinds of action would be and have been shown to be useless. Were there no new developments in the common law no remedy would be available for such harm. But the common law, as always, has shown itself to be sufficiently flexible to mould new actions out of the ideas of a former age. Just as with the development of negligence from the old action on the case to the new tort of negligence (which, despite the arguments of Dean Wright [77] and Professor Seavey,[78] the English courts seem to have recognised, in place of individual instances of liability for negligently caused harm), so with the old idea of "malice," which, from being an element in certain forms of liability, has widened its scope in many ways, until it looks very much as though beyond such kinds of liability there is a new use for "malice" as the foundation of a "new" tort of intention. Dean Wright does not agree that such a tort does exist, any more than there exists a tort of negligence. But, with all respect, it is suggested that, while the language of the judges sometimes allows of doubt and confusion, there is behind that language the evolution of the idea that, within the framework of the common law, a tort of intention should exist, can exist, and is beginning to exist.[79]

G. H. L. Fridman.*

[77] *Op. cit.*, n. 75.
[78] *Cogitations on Torts* (1954) at pp. 24–25.
[79] For their very helpful criticisms and suggestions in the course of discussion I am greatly indebted to Professor Raphael Powell and Professor Dennis Lloyd.

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COMPARATIVE OBSERVATIONS ON LEGAL EFFECTS OF COLLECTIVE AGREEMENTS [1]

Although the problem of collective agreements has received attention from the I L O from the first years of its existence and resulted in 1936 in an important international study, it is only since the war, in the framework of a vast programme of standard setting in the field of industrial relations undertaken in 1947, that the International Labour Conference has been called upon to examine the question of international regulations on the subject. After having in 1948 adopted the Convention on the Freedom of Association and the Protection of the Right to Organise, which defined the essential guarantees which trade unions must enjoy both for their establishment and functioning, the Conference adopted in 1949 the Convention on the Right to Organise and Bargain Collectively. This Convention, now ratified by 38 member States, mentions particularly that " measures appropriate to national conditions shall be taken where necessary to encourage and promote the full development and utilisation of machinery for voluntary negotiation between employers or employers' organisations and workers' organisations with a view to the regulation of terms and conditions of employment by means of collective agreements." Two years later, in 1951, the Conference—wishing to give effect to this general principle—adopted the Recommendation concerning Collective Agreements. The aim of this Recommendation was to formulate a certain number of principles which appeared essential to promote the conclusion of collective agreements and to ensure their application, while, however, giving them sufficient flexibility to take into account the diversity of national practices in existence making it possible to implement the provisions of the Recommendation in a great variety of ways and without having to follow a set pattern.

It is quite clear from the first part of the Recommendation which provides that " machinery appropriate to the conditions existing in each country should be established, by means of agreement or laws or regulations as may be appropriate under national conditions, to negotiate, conclude, revise and renew collective agreements or to be available to assist the parties " in this regard. The Conference left the member States perfectly free to choose either the voluntary or the legislative method to encourage collective bargaining. One can take the view, however, that a certain emphasis has been placed on the voluntary method since it

1 This article is based upon an address delivered to the Labour Law Congress held in Geneva in 1957.

is mentioned first, and more so when it is realised that this wording was agreed to at the second reading, for it was in this way possible to emphasise the importance of voluntary agreements in a field where the free consent of the two parties is definitely indispensable to the actual conclusion of a collective agreement. I need hardly add that it was emphasised during the proceedings that the two methods were not mutually exclusive, and that they could on the contrary, in certain cases, usefully complement one another.

The second part of the Recommendation contains a definition of collective agreements. For the purpose of the Recommendation the term collective agreement means "an agreement in writing regarding working conditions and terms of employment concluded between an employer, a group of employers, or one or more employers' organisations on the one hand, and one or more representative workers' organisations, or in the absence of such organisations the representatives of the workers duly elected and authorised by them in accordance with national laws and regulations, on the other." This is an extremely broad definition and one which covers the most diverse types of collective agreements. As far as the contents of collective agreements are concerned you will notice that there is no precise indication of which subjects are regarded as suitable for collective bargaining and which are not. The Recommendation simply states "all agreements regarding working conditions and terms of employment." But if there is any one conclusion emerging from the examination of the content of collective agreements (one which has been emphasised by various observers) it is that the field of problems with which they are concerned is becoming progressively larger. In fact, once the principle of collective bargaining is admitted, it will tend to be applied to the most diverse problems. But precisely because of the diversity of the questions dealt with, it would be very difficult to derive from a comparative examination of the contents of collective agreements a theoretical line of demarcation between those questions which are suitable for bargaining and those which belong exclusively to the domain of management. At a meeting of experts brought together by the I L O last year to examine problems concerning industrial and human relations several experts expressed the opinion that "decisions relating to the management of the undertaking, the expansion of its activities, financing, marketing, type of production and other similar matters should be the sole responsibility of management and would not be proper subjects for collective bargaining." Other experts, however, emphasised that "if such decisions of the management had repercussions on job security, labour standards or wage rates, they should be the subject of joint examination between the employers and the representatives of the workers." In this respect, certain American trade unions have pointed out, for example, that it is illogical to hear management maintain that the demands of the

union are completely unreasonable and formulated without any regard for the impact on the cost picture, and on the other hand if the union suggests means by which its demands could be met—means having to do with price policy—to hear management reply to the union that this is not their business and that by offering such suggestions they are attempting to take over the business. It is indeed significant that in recent years there have been introduced into collective agreements an ever-increasing number of provisions which formally recognise the prerogatives of management. It has been said that this effort on the part of the managers to obtain recognition from the unions is as significant a social struggle as the earlier efforts of the unions to obtain recognition from the managers.

In its third section the Recommendation deals with the effects of collective agreements. It emphasises first that all collective agreements should bind the signatories thereto and those on whose behalf the agreement is concluded. The consequence of this is, on the one hand, that the employers and workers bound by a collective agreement should not be able to include in contracts of employment stipulations contrary to those contained in the collective agreement, and on the other, that stipulations of such contracts of employment which are contrary to a collective agreement should be regarded as null and void and automatically replaced by the corresponding stipulations of the collective agreement. However, stipulations in contracts of employment which are more favourable to the workers than those prescribed by a collective agreement should not be recognised as contrary to the collective agreement. The Recommendation specifies that if effective observance of the provisions of collective agreements is secured by the parties thereto, the provisions that I have just mentioned should not be regarded as calling for legislative measures. Lastly, the Recommendation adds that the stipulations of a collective agreement should apply to all workers of the classes concerned, employed in the undertakings covered by the agreement, unless the agreement specifically provides to the contrary.

The fourth section of the Recommendation provides for the extension of collective agreements to all the employers and workers included within the industrial and territorial scope of the agreement. It adds that national legislation may make such an extension subject to certain conditions on which I do not wish to elaborate, since the extension of collective agreements is not one of specific items on the agenda of the Congress.

In its fifth and sixth sections the Recommendation refers, first to the interpretation of collective agreements, mentioning that a procedure for the settlement of disputes arising out of such interpretation should be established either by agreement between the parties or by laws or regulations, then to the supervision of their application, stipulating that such supervision should be ensured

either by the employers' and workers' organisations which are parties to such agreements or by the bodies existing in each country for this purpose or by *ad hoc* bodies.

The final concluding section of the Recommendation contains a number of provisions the object of which is to furnish governments with examples of legislative measures which may be eventually adopted by their particular country. These measures relate to the publicity which should be given to collective agreements, to their registration or deposit and to the period of their validity.

So much for the principles embodied in the Recommendation on Collective Agreements of 1951. It is clear that the Conference has confined itself to pointing out a certain number of objectives to be achieved without specifying the best way of attaining these objectives, for it must take into account the great variety in the different systems of collective agreements which reflect the diversity of ideas and practices peculiar to the different countries.

This diversity is well known to all those working in this field. Is there in fact a common denominator between the various systems of collective agreements, and, if there is one, is it of a legal nature? It is a question worth asking. Recently, Mr. Blanc-Jouvan, Lecturer in the Faculty of Law at Grenoble, made a very interesting study on collective labour relations in the United States, after a year's sojourn in that country. He concludes this study with a striking observation: "It is evident," he writes, "that while comparison of the American and French systems of industrial relations might be suitable work for an economist or sociologist, it cannot be so for a lawyer. The law of collective labour relations is too intimately bound up with the economic, social and political structures of each national community and these structures are in this particular case much too dissimilar for a comparison, either of similarities or differences, to be made of the institutions existing in our two countries. The techniques employed indeed sometimes resemble one another, but one is forced to recognise that they do not apply to the same substance nor are they used to resolve the same problems." This opinion seems to me entirely justified. When it is recognised that by the term "collective agreement" one means, depending on the country referred to, either legal instruments or a widely differing scope of documents with no legal effect in the real sense of the term and creating only moral obligations, one comes inevitably to the conclusion that it is not on the legal plane, or at least not on this plane alone, that a detailed comparative study of the systems of collective agreements can be usefully undertaken.

A comparison from a legal point of view certainly has the great advantage of highlighting the considerable differences that exist between the various systems. We can see that differences appear, for instance, on the following points:

(*a*) The spheres covered by labour legislation and collective

agreements respectively. Their relative importance varies considerably from country to country and, as it were, inversely between themselves. The more labour legislation abounds, the more limited will be the number of points regulated by means of collective agreements. The inverse is equally true. The United States has, for instance, no legislation on paid holidays, but the question is dealt with by collective agreements. Similarly you can look in vain in that country for legislation on works councils such as exists in several European countries (France, Belgium, Germany and Holland) and interested circles are not greatly excited by the idea of such legislation; but observers have agreed that through the medium of collective bargaining United States workers have often obtained a genuine right to co-determination.

(*b*) The substance of legislation concerning collective agreements, particularly in respect to the part played by the government in this field. Sometimes there is an actual legal obligation to negotiate on the part of the employer. Thus, in the United States, the Taft-Hartley Act provides "it shall be an unfair labor practice for an employer . . . . to refuse to bargain collectively with the representatives of his employees, subject to the provision of section 9 (a)" which stipulates that "representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes shall be the exclusive representatives of all the employees in such unit. . . ."[2] In other countries no such requirement to bargain exists, but the law provides, on the other hand, governmental assistance to encourage a bringing together of the viewpoints of parties. This is the case with joint committees in Belgium in which employers and workers of the same industry meet under the chairmanship of a third person appointed by the appropriate minister.[3] Again, there are countries where government assistance is supplemented by a measure of supervision, in that the contents of collective agreements are submitted for approval to the public authorities. Such is the case in Holland.

(*c*) The influence of collective agreements on individual work relations. The relevant laws usually provide that the provisions in the individual work contract which are less favourable than those of the collective agreement, must be considered null and void and automatically replaced by the corresponding provisions of the agreement. Sometimes they even provide—as in the case of the legislation recently adopted in Israel—that those provisions which are more favourable than those of the collective agreement can only be considered valid if not expressly forbidden by the agreement.

[2] *Cf.* National Report concerning Content, Legal Effects, Application and Execution of Collective Agreements in the United States, by Professor Archibald Cox, Harvard University, p. 4.

[3] *Cf.* National Report concerning Content, Legal Effects, Application and Execution of Collective Agreements in Belgium, by Professor Paul Horion, Liége University, p. 3.

But in the United Kingdom there is no legal obligation for the employer to apply the provisions of the collective agreement to the individual worker, and the only effective means of carrying out the collective agreement are the employer's wish to keep his word, and the power of the trade unions. As was so rightly pointed out by Professor Kahn-Freund, the norms " of the vast corpus of collective bargaining are enforced by social and not by legal sanctions." [4]

(*d*) The significance of the very term " collective agreement." The latter is used to cover arrangements having quite different purposes and if, in certain countries, particularly on the Continent, the advent of the phenomenon of collective agreements has given rise to considerable discussion on the legal nature of the collective agreement, in other countries the question has not received much attention, either, as in the United States, because of the pragmatic and individualistic character of American law [5] or, as in Great Britain, because the collective agreement does not have a contractual nature and that " subject to exceptions, collective agreements have no place in the legal order." [6]

It will serve no purpose to multiply these examples. Having once noted the variety of concepts which exist in this field it is indispensable to widen the scope of one's inquiries, if one wants to keep in touch with reality and to produce something of a useful and practical nature. Of course, one can make elaborate legal comparison between related systems of collective agreements, and it is precisely this that the gentlemen presenting the General Reports have carried out with such consummate skill, but as soon as one approaches a really international level one finds that, in limiting one's study to the legal plane alone, there is a risk of making distinctions or finding similarities based sometimes more on form than on substance, and which, because of this, would be more likely to distort issues than to clarify them. Take, for example, the question of extending collective agreements to third parties. This is a question which in several countries constitutes an essential part of the legislation on the subject, but we have to admit that the jurist will always have a natural tendency to be overly impressed by the actual text of a law, setting out in detail the various steps of an extension procedure, even if such a procedure is rarely used in practice. On the other hand, he might be inclined to emphasise the fact that in Great Britain or the United States the State does not intervene to compel third parties to apply the clauses of collective agreements. But, at the same time, in Great Britain it is generally agreed that the collective agreement concluded at the level of the industry by authorised representatives of employers and workers becomes the established practice and, as for the United

[4] *Cf.* National Report concerning Content, Legal Effects, Application and Execution of Collective Agreements in Great Britain, by Professor Kahn-Freund, p. 3.
[5] *Cf.* Professor Archibald Cox, *op. cit.*, p. 2.
[6] Professor Kahn-Freund, *op. cit.*, p. 3.

States, although collective agreements are usually concluded at the company or plant level, which would make an extension procedure more difficult, it can be noted that in several instances there exist "key contracts" which generally set the pattern. There is then an extension in practice, the effects of which are just as important as those emanating from an extension established by law.

Thus, it seems to me most important that all the jurists who undertake a *comparative* study of collective agreements should try to go outside the framework of their own discipline and interest themselves in the entire sociological phenomena of collective bargaining. The collective agreement, fruit of negotiation, remains one of the essential elements which the observer must take into account in the sweep of his investigations, but he must broaden his field and take into consideration a whole series of other factors no longer legal but economic, psychological and industrial. As emphasised by the Director-General of the International Labour Office in the Report he presented to the 38th Session of the International Labour Conference,[7] the mere fact that employers and workers agree to bargain collectively is not sufficient to ensure satisfactory relationships. Much depends on the state of mind in which they engage in negotiations. Emphasis has often been placed upon the influence which can be exercised on relations between employers and workers and by sound civic traditions, and by a philosophy based on co-operation among all social groups, the mutual attachment of the parties to régimes, ideals or ways of life which extend to the community as a whole.

What is the nature of the relationships between the parties ? Are they based purely on bargaining strength which compels the parties to achieve a balance of divergent interests, or do they contain certain elements favouring a co-operative spirit for the achievement of certain common objectives? What are the attitudes of parties to collective bargaining ? How can they be explained ? Is it true that in certain countries at least there is a growing inclination on the part of management and labour in their collective negotiations to rely on facts and reason rather than on threats and industrial strife ? What then are the relevant facts and data which should be made available to the parties for use in good faith in the process of collective bargaining ? Questions such as these engage the attention of observers of the social scene more and more. For example, in a study of attitudes of employers and workers in collective negotiations covering about 100 industrial undertakings in the United States, three main types of relationships were distinguished: "armed truce," where the two parties are convinced that their major objectives are in conflict and their common interests extremely limited but that they must nevertheless learn to live together; "working harmony," where the parties lock on collective

[7] Report of the Director-General, International Labour Conference, 38th Session, Geneva, 1955, p. 64.

bargaining more as a means of working together than as a competitive struggle for power; and "union-management co-operation," where the emphasis of the parties is on joint action aimed at reducing unit costs of production, increasing efficiency and improving the competitive position of the firm.[8]

Similarly, the question of knowing which—if any—is the most appropriate level for the conclusion of collective agreements—that of the company or plant, as is generally the practice in the United States and Canada or, at a broader level, national, regional or local, bringing together the organisations of workers and employers—is certainly among those which have attracted the most attention from numerous productivity missions undertaken in recent years in the United States from various European countries. One of the reasons for this interest is that it has been maintained that there is a link between the level at which a collective agreement is concluded and the attitude of the parties. Negotiation at the company or plant level, it is said, is a catalyst for co-operation and understanding: doctrinal divergences are played down, directors of undertakings are encouraged to face their responsibilities instead of sheltering behind a written agreement which they have to apply out of loyalty to their trade association; because of this, they devote more time to these problems, the importance of which they often recognise in terms of the structure of their own organisation[9]; disputes often cover a more limited area, tending to remain more pragmatic in character and taking account, in their settlement, of the particular conditions of each undertaking. Others say, in reply to these contentions, that the broader type of negotiation avoids the growth of the selfish interests of any particular enterprise, emphasises matters of common interest uniting employers and workers, and ensures more uniform conditions of work by guaranteeing the same advantages to different categories of workers, even to those least able to defend themselves.[10] It is not for us to express an opinion on such a question, for both methods have their advantages and cannot be judged in the abstract. But what has been attempted here is to highlight what appears to be a shifting of interest from the question of the *legal nature* of the collective agreement to that of the *sociological framework* in which the collective bargaining process takes place.

Special importance should be attached to the need of not taking a purely legal approach to the study of collective agreement systems. The reason is that nowadays more and more specialists in the

[8] *Cf.* F. R. Harbison and J. R. Coleman: *Goals and Strategy in Collective Bargaining* (New York, Harper and Bros., 1951).

[9] It could be of interest to make a comparative study of the status and role of the personnel director in undertakings of various countries, depending on whether the enterprise is operating under a collective agreement concluded at the level of the industry or on a company or plant level basis.

[10] *Cf.* Les conventions collectives aux Etats-Unis. Report of the French Mission to the United States, November 15–December 22, 1951 (Paris, Société auxiliaire pour la diffusion de éditions de productivité, 1953), p. 84.

different disciplines, whether they be economists, sociologists, psychologists or jurists are, in various parts of the world, insisting that to get to grips with the real problems of the work situation one can no longer study them by a single approach, whatever that approach may be, but must make them the object of a " combination of methods." In saying this I do not want to belittle the importance of the legal discipline as such. I believe on the contrary that a multi-discipline approach to the study of problems raised by industrial relations allows an even deeper legal analysis. If then I have allowed myself to emphasise the limits of the legal discipline used on its own in an area such as this, it was with the aim of preserving the originality and value of its contribution to the study of the problems posed by the evolution of labour-management relations.

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THE BURDEN OF PROOF IN BIGAMY

It is now possible to write a second inglorious chapter to a story that began in an earlier issue of this *Review*.[1] It would be better if this chapter could have remained unwritten. In *R.* v. *Bonnor*[2] a specially constituted Full Court of five judges of the Supreme Court of Victoria by a majority of three to two rejected the principles established in *R.* v. *Broughton*[3] and required a person accused of bigamy to prove on the balance of probabilities the facts on which he relied for exculpation. The two judges who dissented on this issue concurred in the actual order for other reasons.

Bonnor contracted his first marriage to Alice Wilson in England in January 1950 while he was a member of the armed forces. This marriage was not successful. For a time the parties lived apart and his wife obtained a maintenance order against him. He joined the merchant navy and was assigned to a ship on the Australian run. Prior to his departure the accused and his father had discussions with the Public Solicitor[4] with the object of obtaining, possibly during his absence, a divorce on the grounds of his wife's adultery.

In Australia he met his prospective second "wife" and wrote to his father from whom he received a letter which read: "No need to worry over Alice; everything is all right and I wish you all the happiness you can get." Following this letter in March 1952 the accused went through a ceremony of marriage with Patricia Mary Macklin and was duly charged with bigamy. His defence rested on a plea that at the time of the second ceremony he believed that his first marriage had been dissolved by a decree of an English court.[5] The trial judge directed the jury in the following terms:

> "Now gentlemen, that is the basis of the defence which he sets up, that he bona fide believed on reasonable grounds that he was free to marry. You have to consider that, and to ask yourselves whether there is anything in it at all. First of

[1] Associate Professor Norval Morris, "The Burden of Proof in Bigamy" (1955) 18 M.L.R. 452.

[2] [1957] Victorian Reports 227.

[3] [1953] V.L.R. 572.

[4] Described thus in the report at pp. 245–250. I understand that there is no such official in England and that some person connected with the Law Society's legal aid service was probably intended.

[5] There was no evidence of the basis on which the English court could have assumed jurisdiction. In *Fenton* v. *Fenton* [1957] Victorian Reports 17, the Victorian Supreme Court rejected *Travers* v. *Holley* [1953] P. 246. For a commentary thereon see Zelman Cowen, "Divorce and the Domicile" (1957) 31 Australian Law Journal 8. Gavan Duffy and O'Bryan JJ. point out that if the decree was not rested on a domiciliary jurisdiction it would not be entitled to recognition, and if the accused relied on such a divorce it would probably be a mistake of law which would provide no defence; *ibid.*, at pp. 228 and 236.

> all you see, he must satisfy you on the balance of probability that he did honestly believe that he was free to marry, and if you thought that was correct—and you might very well not think it correct at all, he might not have persuaded you of that at all—you then next have to ask yourselves the question 'Did he do so on reasonable grounds?'. . . Unless you think on the balance of probabilities in this case that the man did honestly believe on reasonable grounds that he was free to marry, then the rest of the case is proved by the Crown and he would be guilty of bigamy." [6]

At the outset it should be noted that the direction runs counter to the decision of the Court of Criminal Appeal in *R.* v. *Wheat* [7] that "a bona fide belief on reasonable grounds that the person accused has been divorced, when in fact he has not been divorced, affords no defence in law to the charge of bigamy." [8]

Although there have been valiant attempts [9] to reconcile this decision with that in *R.* v. *Tolson* [10] the explanations seem more appropriate to the realm of metaphysics than to reality. If it be admitted that a mistaken belief can exculpate despite the strict terms of the statute, it would seem that there is no reason for distinguishing one belief from another if the accused's acts in each case would have been innocent if the belief were true.

In *Thomas* v. *R.* [11] the accused believed the first of his two marriages was void because his first wife had not been divorced by her former husband. In admitting this belief as a defence the majority of judges were critical of *R.* v. *Wheat* although only Latham C.J. expressly rejected it. The trial judge in *Bonnor's* case felt obliged by these dicta and the interpretation given to them in *R.* v. *Broughton* to direct that a mistaken belief that the prior marriage had been dissolved was a defence to the charge of bigamy.

Nevertheless the direction given to the jury was challenged on two grounds. First it was argued that it was irrelevant whether the belief was based on reasonable grounds or not so long as it was honestly held. Secondly it was argued that the direction wrongly put the onus of proving mistake upon the accused.

All members of the court agreed that the mistaken belief must be based on reasonable grounds. Barry J. expressed agreement with the decision in *Wilson* v. *Inyang* [12] and adopted the criticism of Gavan Duffy J. in *Broughton's* case that an objective test "shows an alien face" in a definition of a mental state required

[6] *Ibid.*, at pp. 227–228.
[7] [1921] 2 K.B. 119.
[8] *Ibid.*, at p. 125.
[9] See generally the views expressed by the High Court in *Thomas's* case, *post*; Glanville Williams, *Criminal Law: The General Part*, at pp. 140–147 and J. Ll. J. Edwards, *Mens Rea in Statutory Offences*, at pp. 63–76.
[10] (1889) 23 Q.B.D. 168.
[11] (1937) 59 C.L.R. 279.
[12] [1951] 2 K.B. 799.

to constitute *mens rea*.[13] Nevertheless he and the other learned members of the court felt constrained by the decisions in *Bank of New South Wales* v. *Piper*[14] and *Thomas* v. *R.* to import this requirement into the direction.

Indeed Barry and Sholl JJ., who rejected the majority reasoning, agreed in the ultimate decision on the basis that there was no evidence on which a reasonable jury could properly have held that the accused had remarried under a reasonable mistake of fact, or could properly have entertained a reasonable doubt on the question.

Statutory Offences and the Onus of Proof

In reaching their decision that the onus rested on the accused to prove on the balance of probabilities the existence of the facts on which his defence was based, the majority judges were fortified by three decisions of the High Court of Australia which illustrate a path of reasoning unfamiliar to the English lawyer.

Led by the present Chief Justice, Sir Owen Dixon, the High Court has split the defence of mistake off from the morass of *mens rea*. Even where the offence does not require any reference to intent or foresight and would ordinarily be treated as an offence of strict liability, the court has permitted an honest mistake of fact based on reasonable grounds to be raised as an exculpation unless this right has been clearly denied by the statute.

In *Proudman* v. *Dayman*[15] the applicant for special leave to appeal had been convicted on a charge that she had permitted an unlicensed driver to drive her motor-vehicle. Two of the three members of the High Court were prepared to admit that it might be a valid defence to the charge to prove that the accused honestly believed on reasonable grounds that the driver held a licence but denied that the evidence established the defence.

Dixon J., as he then was, stated:

> "It is one thing to deny that a necessary ingredient of the offence is positive knowledge of the fact that the driver holds no subsisting licence. It is another to say that an honest belief founded on reasonable grounds that he is licensed cannot exculpate a person who permits him to drive. As a general rule an honest and reasonable belief in a state of facts, which if they existed would make the defendant's act innocent, affords an excuse for doing what would otherwise be an offence. . . .
>
> . . . The burden of establishing honest and reasonable mistake is in the first place upon the defendant, and he must make it appear that he had reasonable grounds for believing in the existence of a state of facts which, if true, would take his act outside the operation of the enactment, and that on those grounds he did so believe. The burden possibly may not

[13] *Loc. cit.*, 252. The judgment of Barry J. at pp. 252–254 deals fully with the authorities on this point.
[14] [1897] A.C. 383.
[15] (1941) 67 C.L.R. 536.

finally rest upon him of satisfying the tribunal in case of doubt." [16]

These dicta were completely equivocal but the majority in *Bonnor's* case considered that these doubts were resolved by the subsequent decisions in *Dowling* v. *Bowie* [17] and *Bergin* v. *Stack*.[18]

In *Dowling* v. *Bowie* the appellant was convicted of having supplied liquor to a half-caste aboriginal within the meaning of a separate ordinance—the Aboriginals Ordinance, 1918–47. His appeal was successful because the informant had not tendered formal evidence to prove that the person supplied did fall within the statutory definition. However, three members of the court of five adverted to the question of whether it would be a defence to the charge that the accused honestly believed on reasonable grounds that the person supplied was not a half-caste aboriginal.

Dixon J. said: "I am prepared to concede that under section 141 this would be a defence if made out in fact. But I am not satisfied that it has been made out." [19] This statement seemed to the majority in *Bonnor's* case to indicate that it would not have been sufficient that the court was left in doubt. The accused had to convince the court of the existence of the facts on which his defence rested.

Similarly Williams and Taylor JJ. in a joint judgment made the following statement concerning *Sherras* v. *De Rutzen* [20]:

> "In that case, although it was not incumbent upon the prosecution either to allege or to prove knowledge on the part of the defendant that the police officer with whom he had dealt was on duty at the relevant time, the view was taken that the defendant might exculpate himself by proof that he honestly believed on reasonable grounds that the officer was not on duty." [21]

In *Bergin* v. *Stack* the accused was charged with selling liquor without a licence authorising the sale. One of his defences was that the sale took place on the premises of a club which he honestly believed on reasonable grounds to be licensed. The four members of the court who were prepared to concede that mistake could exculpate did not consider that the accused had established such a defence in this case because, *inter alia*, the sale took place outside the lawful trading hours for a club. However Fullagar J., with whom Williams A-C.J. and Taylor J. agreed, stated:

> "Although today in the case of such statutory offences as that created by section 161, any presumption that guilty knowledge is an element in the offence must be taken to be at best a very weak presumption, it seems generally to be held in the absence

16 *Ibid.*, at pp. 540–541.
17 (1952) 86 C.L.R. 136.
18 (1953) 88 C.L.R. 248.
19 *Loc. cit.*, 141.
20 [1895] 1 Q.B. 918.
21 *Loc. cit.*, at pp. 149–150.

> of express provision of clear implication to the contrary that *an affirmative answer* is made to a charge of such an offence *if the defendant proves* that he honestly and reasonably believed in the existence of facts which would make his acts innocent . . ." [22]

and, echoing the remarks of Dixon J. in *Proudman* v. *Dayman*, continued:

> ". . . it is probably still true that, unless from the words, context, subject matter, or general nature of the enactment some reason to the contrary appears, you are to treat honest and reasonable mistake as a ground of exculpation, even from a summary offence." [22]

It might be suggested that these dicta gave little support to the majority decision in *Bonnor's* case as none of the judgments appear to have been concerned with drawing the crucial distinction between the obligation to adduce evidence, or evidential onus, and the obligation of convincing the tribunal, or persuasive onus. However, they were seized upon as justification for an assertion that whatever the position about *mens rea* generally the persuasive onus of proving mistake as a defence invariably rested on the accused.

Now this courageous attempt to disperse the fog of confused thought that surrounds the mental element of crime should be applauded, but it is submitted that the recognition of mistake as a distinct principle is quite inconclusive about the further problem of what should be the result when a tribunal is left in doubt on the question whether the accused was in fact mistaken. Dixon J. realised this in *Proudman* v. *Dayman* where he left the question unanswered. Terms like " defence " carry implications concerning onus of proof in civil matters, and the fact that this and similar terms have been incautiously incorporated into discussions of the problems of the criminal law without any consideration of the different implications that may have to be drawn in a different context only renders critical analysis more difficult. It is suggested that nothing in the subsequent cases indicated that the courts were aware that they were supplying an answer to the problem which Dixon J. had left unresolved.

Nevertheless the minority judges in *Bonnor's* case felt, perhaps incorrectly,[23] that they were forced to concede that in summary offences where the defence of mistake was left open to the accused he could exculpate himself only by discharging the persuasive onus of establishing honest mistake on reasonable grounds.

[22] Italics supplied. *Loc. cit.*, at p. 261.

[23] The writer believes that the extracts marshalled from the judgments in *Dowling* v. *Bowie* and *Bergin* v. *Stack* are consistent with either view, but see Barry J. at p. 257 and Sholl J. at p. 264. The distinction taken by Barry J. is between summary and indictable offences, but the view expressed by Sholl J. appears to be based on wider grounds.

However they denied that this principle applied to the more serious common law offences. The three High Court decisions on which the majority relied were clearly irrelevant to this argument and the dicta that could be gleaned from other authorities such as *Tolson's* case and *Thomas's* case could not be regarded as reliable because the question of onus had not been specifically dealt with in these cases.

Instead the minority sought guidance in *Woolmington's* case [24] and the family of cases which it fathered. This reliance drew strength from *Packett* v. *R.*[25] where the Australian High Court had stated that there was no reason why *Woolmington's* case should not apply in a case where the law of murder had been codified if the statute did not deal with questions of onus of proof. Thus if a person accused of murder pleaded provocation, and the jury were doubtful whether the statutory definition of provocation had been satisfied or not, the proper verdict would be manslaughter and not murder.

On the other hand the majority in *Bonnor's* case found these cases of no assistance. Gavan Duffy J. expressed his feeling in the following terms:

> "*Woolmington's* case certainly made a great impact on English criminal law but it does not extend far enough to change the burden of proof in this common law defence. It and *Mancini's* case [26] and *Chan-Kau's* case [27] to my mind have established so firmly that the prosecution must prove every constituent of the offence that I can imagine no exception, other than by statutory intervention, but they stopped there. In all three cases the charge was murder and the matters considered, self defence and provocation. Both of these go to the very essence of the crime of murder, intention and malice. . . . I have come to the conclusion that the necessity of using exact language to distinguish between a constituent, an ingredient of an offence, what I may call part of the definition of the offence, and the common law defence of belief on reasonable grounds was not always present to the mind of the judges." [28]

This passage contains the kernel of the disagreement. The dissenting judges were unable to concede that this distinction, however valuable for other purposes, ought to affect the principles laid down in *Woolmington's* case concerning onus of proof. Once it is conceded, as *Tolson's* case and *Thomas's* case seem to require, that in the law of bigamy it is necessary to refer to the beliefs of the accused, it is largely a matter of expression whether that reference is contained in the definition of the offence or the circumstances

[24] [1935] A.C. 462.
[25] (1937) 58 C.L.R. 190.
[26] [1942] A.C. 1.
[27] [1955] A.C. 206.
[28] *Loc. cit.*, at p. 234.

which would exculpate from liability. The minority refused to make legal liability dance to the turn of a phrase.

The principle underlying the decision in *Woolmington's* case was the broad proposition that " throughout the web of the English criminal law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt." [29] That proposition is certainly sufficiently general to establish the minority view. If the principle is to be limited in any way it is surely more rational that it should depend on the gravity of the offence rather than its verbal definition.

In *Broughton's* case the accused relied on alternative pleas that his wife had been absent for seven years during which period he had not known her to be living or that he had made an honest mistake based on reasonable grounds that this was true. In that case the Supreme Court of Victoria confirmed the view expressed by Professor Glanville Williams that " If the accused gives evidence that he and his wife separated seven years before his second marriage, and if the jury are not satisfied beyond reasonable doubt that this evidence is false, it is incumbent on the prosecution to prove that during that period the accused knew his wife to be alive." [30]

Professor Norval Morris has demonstrated that *Broughton's* case was consistent with the historical development of the offence and the convenience of proof.[31] In departing from that decision, the majority in *Bonnor's* case have obliterated the distinction between the evidential onus and the persuasive onus, with the result that not only is analysis unsatisfying but manifest injustice may flow from technical decisions. The layman is familiar with " the benefit of the doubt " and he finds the task of convicting a person whose explanation may well be true, although it is not completely convincing, a task that is repugnant to any concept of justice. Bigamy is still an offence which attracts a considerable moral and social odium even when the legal penalty is lightened. A legal system which requires conviction in these circumstances will not earn the admiration and respect of its subjects. It can only be hoped that the High Court will have an early opportunity to overrule the principles laid down in *Bonnor's* case.

D. J. MacDougall.*

[29] *Loc. cit.*, at p. 481.
[30] *Criminal Law: The General Part*, at p. 719.
[31] (1955) 18 M.L.R., at pp. 455–460. It seems pointless to repeat the arguments (with which the present writer agrees) which were advanced in that article.

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JUDICIAL IMMUNITY AND THE PROTECTION OF JUSTICES

CIVIL actions against justices of the peace for acts done in their judicial capacity are not frequently encountered nowadays, but two cases of this kind have recently occupied the attention of the Court of Appeal. In the first of these, *O'Connor* v. *Isaacs*,[1] there was much discussion, at first instance especially, of the meaning of the notoriously difficult sections 1 and 2 of the Justices' Protection Act, 1848. In the second, *Boaks* v. *Reece*,[2] the main question involved was whether the defendant had acted within his jurisdiction, which was purely a matter of statutory interpretation. The main problem arising from the Justices' Protection Act, 1848, is still with us: that is whether, and if so, when, a justice of the peace may be liable in an action on the case if he abuses his judicial authority by acting maliciously and without reasonable cause. This depends on the meaning of section 1 of that Act,[3] but the interpretation of that section depends in turn on a complicated interplay of the rules which govern judicial immunity generally. It is impossible properly to construe the section independently of the common law background, and it is considered that there is no *a priori* reason at common law why the liability of justices as judicial officers is something different from the liability of judicial officers generally. It is therefore the purpose of this article to examine the rules which govern judicial immunity, and in the light of those rules to consider the statutory provisions which govern the liability of justices.

The treatment of judicial immunity by text-writers is in the main a clear and confident exposition of a general principle that no action lies against a judge for any act done or words spoken, maliciously or otherwise, as long as he has not exceeded his jurisdiction.[4] Some writers assume that for this purpose "judge" means any person who exercises judicial functions in a public capacity,[5] whilst others distinguish judges according to their position in the judicial system.[6]

There are, then, two propositions which require careful examination: (a) that the protection in respect of acts done is identical

1 [1956] 2 Q.B. 288 (Diplock J. and C.A.).
2 [1957] 1 Q.B. 219 (C.A.); leave to appeal was refused by the House of Lords: *The Times*, February 14, 1957.
3 This is set out at p. 529, *infra*.
4 *e.g.*, Winfield on *Tort* (6th ed.) pp. 108–112; Wade & Phillips, *Constitutional Law* (5th ed.), pp. 250–251.
5 Winfield, *Abuse of Legal Procedure*, pp. 208–211.
6 Salmond on *Torts* (11th ed.), pp. 732 *et seq.*; Street, *Law of Torts*, pp. 98–102.

with that for words spoken; (b) that all judicial officers acting within their jurisdiction are protected even when they act maliciously. Those writers who subscribe to these two propositions recognise the uncertainty surrounding the position of justices and therefore consider justices' protection as something separate, which may amount to an exception to the general principle.

The Relation between the Defences of Judicial Act and Absolute Privilege in Defamation

An act done by a judge is usually alleged to give rise to liability in tort on the ground that the judge has exceeded his jurisdiction. Less frequently, indeed very seldom except in the case of justices, has an allegation of malice been made to support an action in tort where the judge was admittedly acting within his jurisdiction. Very rarely has it been alleged that a judge who utters defamatory remarks is acting outside his jurisdiction,[7] and the usual attack in actions of defamation is to allege that the words were spoken maliciously. When malice has not been alleged or considered by the courts in actions against judges for torts other than defamation the courts have used a variety of terms to indicate why no action lies against a judge acting within his jurisdiction. The sum total of these decisions is that no action lies against any judge who has kept within his jurisdiction.[8] Usually malice is not mentioned in cases of this kind. There is even strong authority that any person entrusted with judicial functions in institutions far removed from courts is protected,[9] but here the courts have usually insisted that the protection is dependent on good faith.[10]

In a few cases the judges have either decided or discussed *obiter* the question of acts committed maliciously, and there are strikingly more precise statements of the law in such cases. On the other hand, there are several cases in which the courts have been dealing with actions for words spoken and have assumed *obiter* that immunity in respect of acts is the same as that for words.[11] Not surprisingly, writers who accept this cite such cases as authority.[12] However, in the cases where a tort other than defamation is alleged,

[7] But see *Law* v. *Llewellyn* [1906] 1 K.B. 487 (C.A.).

[8] See, *e.g.*, *Hammond* v. *Howell* (1677) 2 Mod.Rep. 218; *Kemp* v. *Neville* (1861) 10 C.B.(N.S.) 523; Halsbury, *op. cit.*, Vol. 26, p. 271, note (d), assumes that judicial immunity is absolute within the jurisdiction and states at p. 273 that the immunity applies to inferior courts not of record, *i.e.*, all courts. No case cited in support bears out this proposition.

[9] *e.g.*, *Tozer* v. *Child* (1857) 7 E. & B. 377 (churchwardens deciding voting rights); *Partridge* v. *General Council of Medical Education and Registration* (1890) 25 Q.B.D. 90 (C.A.) (statutory body exercising disciplinary powers over doctors and dentists); *Everett* v. *Griffiths* [1921] 1 A.C. 361 (H.L.) (equivalent of justices' jurisdiction in lunacy).

[10] The cases cited in n. 9 all contain *obiter dicta* to this effect.

[11] *e.g.*, *Scott* v. *Stansfield* (1868) L.R. 3 Exch. 220; *Thomas* v. *Churton* (1862) 2 B. & S. 475.

[12] See Winfield, *op. cit.*, nn. 4 and 5, *supra*; Salmond, *op. cit.*, p. 451, note (i).

the courts have expressed themselves in narrower terms when dealing with the question of malice. Two of the judges of the Court of Appeal in *Anderson* v. *Gorrie* [13] based their decision that the defendant was not liable in trespass, even though alleged to have acted maliciously, on the fact that he was a judge of a court of record. Immunity of a judge of the Court of Queen's Bench for maliciously striking out a claim was based on his status as a judge of a superior court in *Fray* v. *Blackburn*.[14] It was decided in *Garnett* v. *Ferrand* [15] that a coroner, as a judge of record, could not be civilly liable and the court clearly took the view that abuse of authority was a matter for the criminal law alone. There was, however, no allegation of malice. *Green* v. *Hundred of Buccle-churches* contains a similar statement with reference to a justice of the peace as a judge of record,[16] but this was *obiter* only.

In such cases the courts have abstained from laying down a principle that all persons who exercise judicial functions are absolutely protected in respect of acts done maliciously but within their jurisdiction. On the contrary, by stressing the status of the particular defendant they have recognised in effect the proposition expressed by Lord Moulton in *Everett* v. *Griffiths* [17] that the degree of protection varies in these circumstances according to the judicial position of the particular defendant.

In actions of defamation, however, it has been held that the defence of absolute privilege applies to words spoken by officers of tribunals which act in a manner analogous to the courts,[18] and no distinction is drawn between the various types of courts.[19] The actual decisions on judicial *acts* afford no authority for the supposition that such persons would have a defence if they acted maliciously. The two cases of *Lilley* v. *Roney* [20] and *Partridge* v. *General Council, etc.*,[21] suggest the contrary. In the former it was held that a complaint to the disciplinary committee of the Law Society was absolutely privileged, and, presumably, any statements made by that committee in the proceedings would have been absolutely privileged. In the latter case the Court of Appeal held that the functions of the General Council in respect of orders to remove a dentist's name from the register were judicial functions, and that *in the absence of malice* they were not liable in tort even though their order was wrong in law.

13 [1895] 1 Q.B. 668 (C.A.); Lord Esher M.R. and A. L. Smith L.J., at pp. 670, 672 respectively.
14 (1863) 3 B. & S. 576.
15 (1827) 6 B. & C. 611.
16 (1589) 1 Leon. 323.
17 [1921] 1 A.C. 631, 696.
18 *Co-partnership Farms* v. *Harvey-Smith* [1918] 2 K.B. 405; approved in *Gerhold* v. *Baker* (1918) 35 T.L.R. 102 (C.A.); see also *O'Connor* v. *Waldron* [1935] A.C. 76 (J.C.).
19 It is from this lack of particularity that the confusion between the defences of judicial act and absolute privilege has arisen.
20 (1892) 61 L.J.Q.B. 727.
21 (1890) 25 Q.B.D. 90 (C.A.).

In *Everett* v. *Griffiths*,[22] Atkin L.J., dissenting, held that the defence of judicial act was confined to judges of courts of record, and that liability for defamation raised different considerations. In so far as he held in the result that the defendant was liable for negligent acts his view is contrary to that of the decision of the majority and of a unanimous House of Lords. But no one save Viscount Finlay, *obiter*,[23] thought that the defendant would have been protected if he had acted maliciously; some of their lordships took the contrary view.[24] And yet the defence that was upheld was that the defendant was exercising judicial functions within his jurisdiction.

In *Hamilton* v. *Anderson*,[25] Lord Chelmsford stopped counsel from citing defamation cases in an action based on a malicious act and said in his speech that liability in defamation was not governed by the same considerations.

The cases in which it has been said *obiter* that liability in respect of acts done and words spoken is the same in judicial immunity have almost without exception been defamation cases.[26] Moreover, in almost all it is clear that the defendants as judges of courts of record would have been immune from an action of, *e.g.*, trespass, had they acted maliciously, for the decision in *Anderson* v. *Gorrie* would apply. Yet, once it is recognised that absolute privilege in defamation ranges over a wider area than the courts have as yet applied in respect of judicial acts, it is obviously unsafe to conclude that the two defences together comprise one defence of judicial immunity. The consistent recognition by the courts that there is a defence of judicial act which is limited to acts done in good faith in some instances is perhaps the strongest indication that it is not safe to equate the defences of judicial act and absolute privilege in judicial proceedings.

Malice and the Defence of Judicial Act

It remains to be considered how the courts distinguish those defendants who are liable in tort if they act maliciously from those who are not. There are four ways of classifying courts which can be relevant and these four classifications are best described at this stage in order that the import of the relevant cases can then be considered.

(a) *Superior courts*: The ambiguity inherent in this term is one which has consistently bedevilled expositions by even the most learned writers. A superior court is in one sense a court which is

[22] [1920] 3 K.B. 163, 205–206 (C.A.).
[23] [1921] 1 A.C. 631, 666 (H.L.).
[24] Viscount Haldane at p. 660 seemed to insist on good faith; Lord Moulton at pp. 695–696; Viscount Cave at p. 678.
[25] (1858) 3 Macq. 363, 375 (H.L.Sc.).
[26] See n. 11, *supra*; *Anderson* v. *Gorrie* [1895] 1 Q.B. 668, 671 is the conspicuous exception, but in that case the dictum was innocuous because in the context Lord Esher was speaking of judges of record only.

presumed to have jurisdiction until the contrary is established by evidence; in the other sense it is a court which cannot be restrained by prohibition from exceeding its jurisdiction.[27] Ecclesiastical[28] and palatine[29] courts are superior in the former sense but writs of prohibition have been granted against both.[30] The distinction is vital if Holdsworth is correct in his assertion that superior courts can never be said to exceed their jurisdiction.[31] Indeed, the case on which Holdsworth based his view was *Peacock* v. *Bell*,[32] a case concerning the palatine court of Durham, which can in fact be restrained by prohibition.

(b) *Inferior courts*: This term is presumably subject to the same ambiguity as its opposite, but there is no doubt that both types could be said to exceed their jurisdiction.

(c) *Courts of record*: This is a court which is defined by reference to the functions it exercises. It is a court which has jurisdiction to fine and imprison[33] or a court with jurisdiction to try civil causes according to the common law in matters involving forty shillings or more.[34]

(d) *Courts not of record*: The characteristics of such courts are obvious from the definition of courts of record.

It is clear that such scanty authority as exists on the specific question of protection in respect of malicious acts has so far confined this protection to judges of courts of record. If the cases on justices are for the present excluded the division between absolute and qualified protection can be explained along these lines, although the courts have not been at pains to explain the difference in the degree of protection. However, Winfield took the view that, although Year Book cases hinted at a distinction between courts of record and other courts, nothing turned on this in modern law.[35] Since he held that there was no civil liability at all for malicious acts if the defendant was exercising judicial functions (except perhaps in the case of justices),[36] the cases which recognise such liability compel us, despite Winfield's assertion, to examine the distinction which he believed not to exist.

Salmond[37] thought that *Haggard* v. *Pélicier Frères*[38] extended judicial immunity to courts other than of record, and it is true that

27 *R.* v. *Chancellor of Edmundsbury and Ipswich* [1948] 1 K.B. 195, 205–206, *per* Wrottesley L.J. (C.A.).
28 *Ricketts* v. *Bodenham* (1836) 4 A. & E. 433, 446, *per* Littledale J.
29 *Peacock* v. *Bell and Kendal* (1667) 1 Saund. 69.
30 *Serjeant* v. *Dale* (1877) 2 Q.B.D. 558 (ecclesiastical court); Com.Dig.A.I. Prohibition (palatine courts).
31 H.E.L., Vol. VI, pp. 238–240.
32 (1667) 1 Saund. 69.
33 *Groenvelt* v. *Burwell* (1700) 1 Ld.Raym. 454, 467; *Kemp* v. *Neville* (1861) 10 C.B.(N.S.) 523, 547.
34 Co.Lit. 260a.
35 *Abuse of Legal Procedure*, p. 207.
36 *Op. cit.*, p. 210.
37 *Op. cit.*, p. 733.
38 [1892] A.C. 61 (J.C.).

the Judicial Committee of the Privy Council held that the defendant, although not a judge of record, was entitled to the same protection as such a judge, and went on to add, *obiter*, that malice was irrelevant. If the Judicial Committee meant to say that the distinction between courts of record and other courts was irrelevant to the defence of judicial act, the language they employed seems unnecessarily mysterious. What they really meant emerges from the submission of the Attorney-General that this distinction did not apply in foreign parts; *Mostyn* v. *Fabrigas* was cited in support.[39]

In *Mostyn* v. *Fabrigas* [40] Lord Mansfield said:

> ". . . . By the law of England, if an action be brought against a judge of record for an act done by him in his judicial capacity, he may plead that he did it as judge of record and that will be a complete justification. So in this case, if the injury complained of had been done by the defendant as a judge, though it arose in a foreign court where the technical distinction of a court of record does not exist, yet sitting as a judge in a court of justice, subject to a superior review, he would be within the reason of the rule which the law of England says shall be a justification."

The defendant in *Haggard's* case was judge of the consular court at Mauritius which had plenary civil jurisdiction over British subjects on the island. A court with such jurisdiction *according to the common law* is a court of record, but Mauritius was a ceded colony and its system of law was the Code Napoleon. It is therefore clear why it was not a court of record, and why the Judicial Committee held that the defendant was entitled to the same protection as a judge of record. It is also clear that the case is no authority for the proposition that the status of a court of record is no longer relevant; the language employed by Lord Watson would seem to suggest the exact opposite, for in applying the analogy with a court of record he implicitly emphasised the importance of that status in a common law jurisdiction.

A similar point arose in *Hamilton* v. *Anderson* [41] where it was argued that a Sheriff-Substitute was protected as a judge of record. Lord Cranworth held that such a judge was protected when he acted maliciously, but pointed out that " court of record " is a term alien to Scots law. The defendant was protected because he had jurisdiction comparable with that of a superior court in England.[42]

There is also an important distinction between the protection afforded to judges of inferior and superior courts of record, which Holdsworth emphasised—perhaps over-emphasised. We have already seen that, in one sense of the term " superior court," such a court is one which is presumed to have jurisdiction unless the contrary is

[39] At p. 62. It is a pity that Lord Mansfield's words in that case are not included here.
[40] (1774) 1 Cowp. 161, 172.
[41] (1858) 3 Macq. 358 (H.L.Sc.).
[42] At p. 378.

proved. In the other sense, such a court cannot be restrained by prohibition from exceeding its jurisdiction. Holdsworth argued that it follows from *Peacock* v. *Bell*, where the former characteristic was laid down, that a judge of a superior court could never be said to exceed his jurisdiction.[43] This, with respect, was an unfortunate fallacy, for, by omitting to note the ambiguity inherent in the term " superior court " Holdsworth invested the less exalted of this type of tribunal with characteristics unsupported by either logic or authority. Logically, it is impossible to argue that a court which can be restrained by prohibition from exceeding its jurisdiction can never be said to exceed its jurisdiction. That this is no mere terminological quibble is borne out by the fact that the court in *Peacock* v. *Bell* was a palatine court which can be restrained by prohibition from exceeding its jurisdiction. It is submitted that, whilst the circumstances which constitute an excess of jurisdiction for purposes of judicial review need not be so regarded in an action for damages,[44] there is no authority for the proposition that a judge of a superior court which can be restrained by prohibition cannot be proved to have exceeded his jurisdiction if he raises the defence of judicial act in an action for damages.

On the other hand, there is authority—though not of the strongest—that a judge of High Court status is answerable only to the Queen and can never be sued for an act done in his judicial capacity,[45] and this seems to mean that such a judge can never be said to exceed his jurisdiction.[46] Such a judge is, of course, a judge of a superior court in the more exalted sense. This may well be so, but there seems no reason why the protection of a superior court in either sense should be greater than that of an inferior court when no question arises whether the jurisdiction has been exceeded.[46a] In all courts of record, it has been submitted, the immunity is identical in respect of acts done within the jurisdiction, *i.e.*, malice is irrelevant.

It can therefore be seen that the question of whether a justice was liable to an action at common law if he maliciously abused his judicial authority would depend on whether he acted as a court of record. But before this question is considered, the conclusions so far reached must be summarised:

(1) A judge of a court of record is absolutely protected from civil liability in respect of all acts done within his jurisdiction. This protection applies to judges of both superior and inferior courts of record.

(2) A judge of a superior court is presumed to have jurisdiction unless the contrary is established by the plaintiff, and it may be

[43] See n. 31, *supra*.
[44] *Pease* v. *Chaytor* (1863) 3 B. & S. 620, 643, *per* Blackburn J.
[45] *Taffe* v. *Downes* (1813) 3 Moo.P.C., n. (C.P.Ir.).
[46] Holdsworth drew the same inference from *Peacock* v. *Bell*: see H.E.L., Vol. VI, p. 239.
[46a] See Lord Esher's dictum in *Anderson* v. *Gorrie* [1895] 1 Q.B. 668, 671.

that judges of courts which cannot be restrained from exceeding their jurisdiction cannot be said to have done so in an action in tort.

(3) The basis of the defence of judicial act is narrower than that of absolute privilege in defamation even if this is confined solely to judicial proceedings. A decision that a statement is absolutely privileged does not therefore mean that a malicious act by the defendant would give rise to no liability.

(4) Apart from foreign courts which do not administer the common law, immunity in respect of malicious acts has so far been confined to judges of courts of record.

The Tortious Liability of Justices Who Act Maliciously within their Jurisdiction

(a) *At common law*: The question whether justices lose the protection normally afforded to judges if they maliciously abuse their power has formed the subject-matter of very few actual decisions. There are, however, numerous *obiter dicta*, mostly since the statute of 43 Geo. 3, c. 141 (1803) and the Justices' Protection Act, 1848, which hold that they do and do not. These dicta are usually regarded as conflicting, and until the courts themselves disentangle the problems involved the confusion must remain. And yet it is possible to reconcile at least some of the dicta which are regarded as in conflict. The judicial work of justices, still more the entire range of their activities, is of many and varied kinds, and there seems no reason why the liability of justices should remain constant within this range of judicial work. Some judges are protected whether they act in good faith or not; others depend on their good faith for protection. It has been suggested that the dividing line is that which distinguishes courts of record from other courts. If this is correct a partial solution of the difficulty is that a justice who acts as a court of record is absolutely protected as long as he acts within his jurisdiction, but if he acts in other capacities he will be liable if he acts maliciously.

Judicial and academic authority of great weight is not lacking for the proposition that justices, even out of sessions, can be a court of record.[47] But it would be absurd to conclude, *e.g.*, that a justice roused from slumber at his home to issue a warrant of arrest is acting as a court of record. Is it then possible to say that in the one case malice is irrelevant and in the other it is relevant to the justice's liability in tort? To answer this question we must first examine the authority for the supposition that justices outside quarter sessions can be a court of record.

[47] 1 Hawk P.C. 160; Burns J.P., Vol. III, pp. 248–250 (9th ed., 1764); *Green* v. *Hundred of Bucclechurches* (1589) 1 Leon. 323; *Basten* v. *Carew* (1825) 3 B. & C. 649; *Ashcroft* v. *Bourne* (1832) 3 B. & Ad. 684, and see *infra*. These authorities are clearly dealing with activities out of sessions. Viscount Haldane in *Everett* v. *Griffiths* [1921] 1 A.C. 631, 658, seems to have taken this view.

Apart from specific authorities to this effect the supposition can be reinforced simply by applying the definition of a court of record. Such a court is one with power to fine and imprison and it has been held in two important cases that a new jurisdiction to fine and imprison creates a new court of record. Thus the censors of the Royal College of Physicians were held for this reason to be a court of record in *Groenvelt* v. *Burwell*.[48] The further point emerges from this case that although, generally speaking, the writ of error lay to courts of record, the mere fact that it did not lie to a particular court did not necessarily mean that this court was not of record[49]; this is important if it is correct, as is commonly held, that the writ of error did not lie to justices out of sessions. The Vice-Chancellor's Court of Cambridge University has also been held to be a court of record because of its criminal jurisdiction.[50] It would seem fair to suppose that justices exercising summary criminal jurisdiction are courts of record.

A further method of approach is by linking the specific rules that records[51] and convictions[52] are conclusive evidence of the facts contained therein; indeed the defence of judicial act has been traced to the sanctity of records.[53] It does not follow that a conviction is necessarily a record in this strict sense, that is, that a conviction has the other qualities of a record. However, it has been held, *obiter*, that a conviction is a record[54]; and if this is so, there is further authority that justices with power to convict are a court of record. It seems, then, that these two specific rules are merely different aspects of one rule.

Indications that justices act as a court of record are also to be found in relation to an exercise of civil jurisdiction. The cases in point are *Basten* v. *Carew*[55] and *Ashcroft* v. *Bourne*.[56] Both cases involved the justices' powers under the Distress for Rent Act, and turned on the question whether a finding of fact by the justices, when such finding had been set down in the record of their proceedings, was controvertible in an action against the justices. It was held by the Court of King's Bench that it was not. Holroyd J. held that the justices were judges of record by statute,[57] and, since this is not expressly provided by the Act, it seems that he was merely applying the definition to the jurisdiction conferred by the Act. Bayley J. seems to have taken the same view.[58] In *Ashcroft* v. *Bourne*, Littledale J.[59] held that the justices were judges of record. It should, however, be pointed out that whilst

[48] (1700) 1 Ld.Raym. 454.
[49] At p. 469.
[50] (1861) 10 C.B.(N.S.) 523.
[51] See, *e.g.*, *Floyd* v. *Barker* (1607) 12 Co.Rep. 23.
[52] See, *e.g.*, *Brittain* v. *Kinnaird* (1819) 1 Brod. & Bing. 432.
[53] Holdsworth, *op. cit.*, Vol. VI, pp. 235–237; *cf.* Winfield, *Abuse of Legal Procedure*, pp. 210–211.
[54] *Chaney* v. *Payne* (1841) 1 Q.B. 712, 124, *per* Denman J.
[55] (1825) 3 B. & C. 649.
[56] (1832) 3 B. & Ad. 684.
[57] At p. 658.
[58] At p. 655.
[59] At p. 688.

most of the judges in both cases referred to the record of the proceedings, the term "record" has so frequently been used in a loose sense [60] that it is unsafe to regard these other expressions as an unequivocal indication that the record was a record in the strict sense. It is to be noticed that neither of these cases concerned convictions, and it is unfortunate that Professor Sheridan [61] should leave the impression that *Basten* v. *Carew* was a case of a conviction by citing only that part of the judgment of Abbott C.J. which referred to convictions. It is submitted that *Basten* v. *Carew* and *Ashcroft* v. *Bourne* are authorities on the protection of the justices in respect of their civil jurisdiction.

The main obstacle in distinguishing the protection of justices according to whether they are or are not a court of record is not so much the decided cases, or even *obiter dicta*, but the approach of text-writers. The overwhelming majority of writers do not distinguish the immunity of judges of record from that of other judges, some because they believe that judicial immunity always excludes liability for malice,[62] relying on cases where either defamation was the act alleged, or malice was not considered, and others because they misunderstood *Haggard* v. *Pelicier Frères*.[63] Any one of these three causes is capable of creating confusion in the rules relating to judicial immunity. Some believe that immunity or liability in the event of malice is dependent on the distinction between judicial and quasi-judicial acts.[64] The term "quasi-judicial" is, happily, seldom found in cases on tort, for it has been the subject of fierce controversy in the context of judicial review. There is an abundance of authority for the proposition that immunity for judicial acts is in some cases dependent on good faith, and the rarity of the term "quasi-judicial" in the cases on immunity for acts done in good faith diminishes the weight of this suggested distinction.

Clerk and Lindsell, on the other hand, neither equate nor distinguish the defences of judicial act and absolute privilege in defamation. They accept the proposition that the status of a court of record is relevant, but take the view that it should not be.[65] Their main ground of objection appears to be that justices are not judges of record, but, as we have seen, there is authority that this supposition is incorrect.

Another obstacle is the unqualified statements in Hawkins [66] and Burn [67] to the effect that a justice of the peace is never civilly

[60] *Cf.* Blackstonce, III, p. 24, with *R.* v. *Northumberland Compensation Appeal Tribunal, ex p. Shaw* [1952] 1 K.B. 338 (C.A.).
[61] "The Protection of Justices" (1951) 14 M.L.R. 267, 273.
[62] See, *e.g.*, Halsbury, Vol. 26, pp. 273, 275.
[63] [1892] A.C. 61 (J.C.); see *supra*, pp. 521, 522.
[64] *e.g.*, Halsbury, *op. cit.*, pp. 284 *et seq.*
[65] *Torts* (11th ed.), p. 892.
[66] 3 P.C., c. 8, s. 74.
[67] *Justices of the Peace* (29th ed.), 1027.

liable for acts done in his judicial capacity, whether maliciously or otherwise, and according to Burn, whether in or out of sessions. No distinction is here drawn between the different judicial capacities of a justice. It may be accepted that whether the justice was acting in or out of quarter sessions is not decisive, and authorities in support of this have already been considered. Despite the great weight of these two authorities, it is submitted, with deference, that if any valid reason can be put forward why the immunity in respect of judicial acts should not be all of a kind, both these statements require qualification. It is the result of the authorities that the protection varies according to the position of the judicial officer, and there seems no *a priori* reason why justices' protection should not vary according to their position when exercising their many and varied powers.

If the cases themselves are considered, the result is that most are consistent with our suggested distinction. If all judicial acts are to be regarded as of a kind for the purposes of justices' protection, dicta in the cases are hopelessly conflicting. The distinction suggested does not reconcile all the dicta, but it does reconcile most; in that event, it may not be overbold to suggest that the few judges whose views do not conform were wrong.

Windham J. in *Green* v. *Hundred of Bucclechurches* [68] thought that no action would lie in that case "because a Justice of the Peace is a Judge of Record and no action lies for what he does as judge." It is submitted that if circumstances arise where the justice is not a judge of record, this dictum is inapplicable even to acts done in a judicial capacity. However, malice was not considered in the case and, consequently, it would be unwise to regard the case as of great assistance on the subject of malicious acts.

In *Windham* v. *Clere* [69] an action on the case for maliciously committing to prison pending a trial succeeded against a justice of the peace, but the report does not make it clear whether the issue of the warrant was or was not within the jurisdiction. However, since the arrest was a trespass, it seems clear that a warrant issued without jurisdiction could be no defence to the justice, and that a simple action of trespass would have succeeded. The insistence on case and an allegation of malice suggest that the act was within the jurisdiction. As to the form of action, this decision was overruled in *Morgan* v. *Hughes*,[70] where it was held that malicious arrest was actionable in trespass even when within the jurisdiction. The contrary view was expressed in *Davis* v. *Capper* [71] by Lord Tenterden, and now, whatever may have been the appropriate

[68] (1589) 1 Leon. 323.
[69] (1589) Cro.Eliz. 130.
[70] (1788) 2 T.R. 225.
[71] (1829) 10 B. & C. 28.

form of action, it is clear that since 1803 if an action lies at all it must be an action on the case. The important point which emerges from these cases is that it is recognised throughout that some form of action will lie for maliciously procuring arrest even though the grant of the warrant was not in excess of the justices' jurisdiction.

On the other hand, no case has been traced before the statute of 1803 in which there is any indication from the court that an action lies for a malicious conviction within the jurisdiction. The nearest case seems to be *Lane* v. *Santeloe*[72] in which damages were recovered against a malicious prosecutor and a justice, but little reliance can be placed on a four-line report at *nisi prius* which gives no indication whether the justice was acting within his jurisdiction or not. Moreover, *Floyd* v. *Barker*[73] contains emphatic *obiter dicta* that judges of courts of record are liable if they conspire out of court, and it is arguable that malicious prosecution instigated out of court by a justice would be actionable for the same reason as such a conspiracy. Thus, even if the justice had maliciously convicted on proceedings maliciously and without reasonable cause instigated by himself, he could be said to be acting out of court in the instigation of those proceedings. And if the conviction was quashed, the requirement that the proceedings should terminate in favour of the accused would be satisfied.[74]

(b) *Under statute*: The Justices' Protection Act, 1848, is the current statute governing the protection of justices, and in this statute sections 1 and 2 draw a clear distinction between acts done within the jurisdiction and those without or in excess of jurisdiction. This statute gives rise to considerable difficulty, but its predecessor, 43 Geo. 3, c. 141, was even more obscure in that no distinction was taken between acts done within and outside the jurisdiction. There are a few indications in the cases that since these statutes an action will lie on the case for a malicious conviction by justices. In no case has it been said that this is the result of the statute in the sense that no such action would have lain at common law. However, no case has been found before the Act of 1803 in which the judges took the view that such an action would have lain, and since 1803, all opinions that such an action lies have been expressed with reference to the provisions of the two statutes. On the other hand, there is authority before and after the statutes that actions lie for maliciously procuring arrest by issuing a warrant,[75] or for malicious committal to prison pending trial.[76]

[72] (1718) 1 Stra. 79.
[73] (1607) 12 Co.Rep. 23.
[74] *Reynolds* v. *Kennedy* (1748) 1 Wils. 232.
[75] *Morgan* v. *Hughes* (1788) 2 T.R. 225; although this case is usually regarded as one of a justice exceeding his jurisdiction, see p. 230; see also *obiter dicta* in *West* v. *Smallwood* (1838) 3 M. & W. 418, 420–421; *Taylor* v. *Nesfield* (1854) 3 E. & B. 724, 730; *Kendall* v. *Wilkinson* (1855) 4 E. & B. 680, 689.
[76] *Windham* v. *Clere* (1589) Cro.Eliz. 130; *Davis* v. *Capper* (1829) 10 B. & C. 28, 38; *Cave* v. *Mountain* (1840) 1 M. & G. 257, 263.

It is not unreasonable, therefore, to infer that as far as malicious convictions are concerned, liability (if any) must have been created by statute, whereas in the case of torts committed in the malicious exercise of other powers conferred on justices there was and is liability before and after the statutes. This inference is of course based on the proposition already argued that justices acting as a court of record are at common law absolutely protected in respect of acts done within their jurisdiction.

The cases since 1803 have dealt with immunity in respect of various functions, but it cannot be said that the judges have usually been at pains to treat these functions separately for purposes of immunity. On the other hand, wide generalisations are not to be found except where they can fairly be construed with reference to particular facts, and there is therefore no obstacle to treating immunity separately according to the activity carried out. The problem has since 1803 become one of statutory interpretation, but to this problem the state of the previous common law is of vital importance.

The statute of 43 Geo. 3, c. 141, was repealed by the Justices' Protection Act, 1848. This statute replaced the old provisions with two sections which continue to the present day to give rise to uncertainty. They are:

> section 1 . . . . "That every Action hereafter to be brought against any Justice of the Peace for any Act done by him in the execution of his duty as such justice, with respect to any Matter within his jurisdiction as such justice, shall be an Action on the Case as for a Tort; and in the declaration it shall be expressly alleged that such Act was done maliciously and without reasonable and probable cause; and if at the Trial of any such Action, upon the General Issue being pleaded, the plaintiff shall fail to prove such Allegation, he shall be nonsuit, or a Verdict shall be given for the defendant.
>
> 2 . . . . "That for any Act done by a Justice of the Peace in a Matter of which by Law he has not jurisdiction, or in which he shall have exceeded his jurisdiction, any person injured thereby, or by any Act done under any Conviction or Order made or Warrant issued by such Justice in any such Matter, may maintain an Action against such Justice in the same Form and in the same Case as he might have done before the passing of this Act, without making any allegation in his Declaration that the Act complained of was done maliciously and without reasonable and probable Cause: Provided nevertheless, that no such Action shall be brought for anything done under such Conviction or Order until after such Conviction shall have been quashed, either upon Appeal or upon

> Application to Her Majesty's Court of Queen's Bench. . . ."

It is important to bear in mind that throughout section 1 there is no suggestion that an action always lies against a justice acting within his jurisdiction if malice and the absence of reasonable and probable cause are alleged and proved. That every action fails unless this is proven does not logically support the proposition that every action succeeds if it is proven. But one action succeeded before this Act for maliciously committing to prison pending trial,[77] and *obiter dicta* since the Act are almost all consistent in holding that an action lies for malicious abuse of such magisterial functions as issuing warrants, committal pending trial and the power to grant or refuse bail.[78] In view of what has been suggested as the basis of the defence of judicial act, it is submitted that it is good law that in these instances of judicial functions justices are protected only if they act in good faith.

Since the Act the only dictum contrary to this view is the dictum of Viscount Finlay in *Everett* v. *Griffiths*[79] that at common law a justice was always absolutely protected in respect of judicial acts within his jurisdiction and that section 1 conferred a qualified immunity in respect of ministerial acts. However, other members of the House of Lords recognised a category of qualified judicial immunity,[80] and once this is recognised (there is, indeed, a great weight of *obiter dicta* recognising it[81]), there is no reason why a justice should be protected in all his functions to the extent to which a judge of a court of record is protected.

It is submitted, therefore, that it is incorrect to group together dicta that a justice is liable for maliciously issuing a warrant and for maliciously convicting, in order to balance them against dicta that no action ever lies against a justice in respect of his judicial functions and, in particular, for maliciously convicting. It has already been submitted that absolute privilege in defamation is irrelevant, but this, too, has been placed together with *obiter dicta* in the second group.[82]

Despite this suggested guide through dicta which are regarded by writers as conflicting, it cannot be suggested that it solves all the difficulties under the 1848 Act. *Burley* v. *Bethune*,[83] where it was assumed that an action lay for a malicious conviction within the jurisdiction, was a case under the 1803 Act, but since 1848 it has also been assumed, though again not decided, in *Kirby* v.

77 *Windham* v. *Clere* (1589) Cro.Eliz. 130.
78 See cases cited at nn. 75–76, *supra*, and *Linford* v. *Fitzroy* (1849) 13 Q.B.D. 240 (bail).
79 [1921] 1 A.C. 631, 666.
80 See n. 24, *supra*, and Lord Atkinson, *ibid.*, at p. 686.
81 See also n. 9, *supra*, for further examples.
82 Salmond, *op. cit.*, p. 734, n. (i).
83 (1814) 5 Taunt. 580.

Simpson [84] by a strong court that such an action lies under section 1 of the Justices' Protection Act, 1848.

In *Kirby* v. *Simpson* an action for maliciously instigating a prosecution and for a malicious conviction failed for want of the statutory notice of action. Parke B. and Platt B. both assumed that the action would lie, and Platt B. reflected on the mysterious wording of the Act.[85] He was unable to understand why in an action for a malicious conviction within the jurisdiction it should not be necessary first to have the conviction quashed, but that it should be necessary in the case of a conviction without jurisdiction. He thought that Parliament had the provisions the wrong way round. With respect, if it is the law that no action lies under the statute for a malicious conviction, it is clear why there is no requirement in section 1 that a conviction should first be quashed. Other orders (unless records) are traversable in collateral proceedings, and it may not have been an oversight that convictions only (and not orders or warrants) require quashing under section 2.[86] In those instances where on the interpretation of a statute an inferior court not of record can make findings of fact which are not traversable in an action against the judge, there is nothing in the decisions to suggest that such facts will not be traversable if malice is alleged,[87] and here again, if they are traversable, there seems no necessity for formal quashing of that court's decision.

In other cases since 1848, the courts have approached with more circumspection the question whether a justice can be liable in tort for a malicious conviction. In *Gelen* v. *Hall* [88] the Court of Exchequer found it necessary to order a retrial before the question could be determined and was careful to refrain from a decision or indeed any expression of opinion that such an action could lie. Pollock C.B. was content to say merely that he doubted whether this was so. In *Fuller* v. *Sutton*,[89] Pollock C.B. appears to have made up his mind on the point, and held that no such action lay; this was merely *obiter*, since the action was brought outside the limitation period. Martin B. reserved his opinion, as

[84] (1854) 10 Ex. 358.

[85] At pp. 367–368.

[86] See Holdsworth, H.E.L., Vol. VI, p. 235, for the distinction between records and other orders in this respect. The true position would appear to be that a record cannot be controverted in collateral proceedings, whilst other orders can, though they may not be where on the interpretation of a statute power is given to make findings of fact which are in this context conclusive; see *Doswell* v. *Impey* (1829) 1 B. & C. 163, 173–174, *per* Abbott C.J.

[87] Whether an action would lie in such a case if malice was proven was expressly left open by Abbott C.J. in *Doswell* v. *Impey*, *supra*; *cf.* Sheridan, *op. cit.*, pp. 273–274.

[88] (1857) 2 H. & N. 379; Watson B. intimated by judicial hearsay at p. 391 that Cresswell J., who heard *Kirby* v. *Simpson* (1854) 10 Ex. 358, was concerned with the merits only on the hypothetical assumption that an action could lie if malice were proven.

[89] (1864) 28 J.P. 391, 392; all these opinions were stated on that page.

did Bramwell B., who added that he did not wish to countenance the idea that it would.

The cases in which it has been said that justices are liable in tort if they maliciously abuse their authority can be briefly summarised. The few before 1803 have already been considered. Since the statute of that year *Davis* v. *Capper* [90] decided that a warrant of committal for an unreasonably long period was in excess of the justice's jurisdiction. Lord Tenterden added that an act within the jurisdiction would have to be based on a corrupt motive and that case was the form of action. *Cave* v. *Mountain* [91] contains an emphatic *obiter dictum* that a justice would be liable if he acted *mala fide* or for improper or malicious motives, and again the act alleged was an unlawful remand in custody.

There are similar dicta in cases concerning arrest under warrants granted by justices. *West* v. *Smallwood* [92] and *Taylor* v. *Nesfield* [93] deal with this type of activity. It was said in *Kendall* v. *Wilkinson* [94] that committal to prison for non-payment of a bastardy order might be actionable if ordered maliciously. *Linford* v. *Fitzroy* [95] concerned the grant of bail and it was there said *obiter* that if it were maliciously refused an action would lie. This may perhaps be regarded as maliciously remanding in custody. All these dicta may fairly be construed to refer to the particular type of activity involved in each case and should not be regarded as of general effect. The only authority in recent times that no action lies for any judicial act committed by a justice within his jurisdiction is the *obiter dictum* by Viscount Finlay in *Everett* v. *Griffiths*.[96]

In *O'Connor* v. *Isaacs* [97] Diplock J. was clearly of the opinion, *obiter*, that committal to prison for failing to pay instalments under a maintenance order could be actionable if malicious, but that in the absence of malice no tort was committed by making the order. And in *Boaks* v. *Reece*,[98] where the question of malice was barely considered, Pilcher J. asked the jury to find whether or not the defendant had acted vindictively in committing the plaintiff in custody for a medical report. The jury's finding that he had not so acted made any discussion of malice unnecessary.

From the apparent chaos surrounding section 1 of the Justices' Protection Act, 1848, it is still possible to propound some coherent rules which can reconcile much of what is regarded as conflicting.

[90] (1829) 10 B. & C. 28.
[91] (1840) 1 M. & G. 257 and 263.
[92] (1838) 3 M. & W. 418, 420–421.
[93] (1854) 3 E. & B. 724, 730.
[94] (1855) 4 E. & B. 680, 689.
[95] (1849) 13 Q.B. 240, 247.
[96] [1921] 1 A.C. 631, 666.
[97] [1956] 2 Q.B. 288, 315; *sed quaere* whether malice would make tortious an act which was not already tortious. If the justice had no jurisdiction to make the order but committed no tort by making it, it is difficult to see why malice should make his conduct tortious.
[98] [1956] 1 W.L.R. 886; affd. [1957] 1 Q.B. 216 (C.A.).

The distinction that has been suggested between the activities of justices as judges of record and in other capacities is merely an aspect of the proposition that immunity for malicious acts is confined to judges of record. If the courts expressly distinguish the different judicial capacities of justices they will do no more than has been done inarticulately by many of their predecessors. The following conclusions may be ventured.

(1) A justice of the peace acts as a court of record when exercising summary criminal jurisdiction. As a judge of such a court he is protected in respect of all acts done within his jurisdiction, whether maliciously or otherwise.

(2) In civil matters, if a justice is entrusted with the jurisdiction of a court or record, he will be similarly protected.

(3) A justice is protected only if he acts in good faith when he discharges judicial functions otherwise than as a court of record. Instances of such functions appear to be the grant of warrants of arrest and presumably search warrants, remands in custody and committal to prison for failure to pay sums of money ordered to be paid under bastardy or maintenance orders. The last, however, could possible be regarded as the exercise of a power which makes the justices a court of record.

Many gaps and unsolved problems remain. The position of a justice of the peace is anomalous in that he is a man of varied judicial parts. It may seem unsatisfactory that his protection should not be uniform whenever he acts in a judicial capacity, but the protection of justices is in substance purely a common law matter and there is no authority that the common law affords protection to any judge who is not a judge of record if that judicial officer abuses his authority. The common law has repeatedly declined to extend this full measure of protection over the whole range of judicial functions. There seems no reason why justices are in any special position, and their protection must therefore depend on the particular type of judicial function which they exercise.

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STATUTES

Recreational Charities Act, 1958

I. R. C. v. *Baddeley* [1] concerned certain trusts "for the promotion of the moral social and physical well-being of persons resident in . . . West Ham and Leyton . . . who for the time being are . . . members or likely to become members of the Methodist Church . . . *by the provision of facilities for moral social and physical training and recreation.* . . ." Harman J.[2] decided that these trusts were not charitable. The Court of Appeal [3] unanimously decided that they were charitable. The House of Lords,[1] by a majority of four to one, decided that the trusts were not charitable.

The law as to what is or is not charitable can hardly be described as satisfactory. It depends on the preamble to the Statute of Elizabeth of 1601,[4] as applied and elaborated in subsequent judicial decisions. The case-law is voluminous,[5] complex, and full of embarrassingly subtle distinctions. When the terms of any particular trust are under consideration by the courts, an unbecoming division of judicial opinion is only too likely; and, before the question is referred to the courts, the lawyers concerned will have found it more than usually difficult to advise whether or not the trust should be treated as charitable.[6] It has been suggested that what is needed is a new, modern, statutory definition of the word "charity" [7]; but, after sympathetic consideration, this suggestion has been rejected by the Government [8]; and, if a statutory definition were attempted, the drafting problem is such that it would be unlikely to reduce either the volume of litigation or the present uncertainty in borderline cases.[9]

[1] [1955] A.C. 572; [1955] 1 All E.R. 525.
[2] [1953] 1 W.L.R. 84; [1953] 1 All E.R. 63.
[3] [1953] Ch. 504; [1953] 2 All E.R. 233.
[4] 43 Eliz. 1, c. 4.
[5] The best-known reported case is, of course, *Commissioners of Income Tax* v. *Pemsel* [1891] A.C. 531.
[6] As was said during the discussion of the Recreational Charities Bill in the House of Commons: ". . . one is probably wrong anyway, for the journey from the Statute of Elizabeth I in 1601 through the *Pemsell* [*sic*] case to the *Baddeley* case is a maze of caprice, fantasy and historical humbug" (*Hansard* H.C., Vol. 582, col. 332).
[7] See the Report of the (Nathan) Committee on the Law and Practice relating to Charitable Trusts Cmnd. 8710; 1952), para. 140. The Nathan Committee's suggestion was well received: see the *Summary of the Views of Voluntary Organisations on the Report of the Committee on the Law and Practice relating to Charitable Trusts*, published by the National Council of Social Service in June, 1953. See also the Royal Commission on the Taxation of Profits and Income, Final Report (Cmnd. 9474; 1955), para. 175.
[8] See the White Paper "Government Policy on Charitable Trusts in England and Wales" (Cmnd. 9538; 1955), paras. 2, 3.
[9] The present Attorney-General thinks that "the real beneficiaries of any new definition would be the members of my profession" (*Hansard*, H.C., Vol. 582, col. 350).

The *Baddeley* case produced a situation in which legislation of some sort was virtually unavoidable. This was the result, not of the actual decision in the case, but of what was said by the Law Lords in their speeches in the case. After reading those speeches it was impossible not to have grave doubts about the charitable status of many organisations and trusts (including, *e.g.*, women's institutes, boys' clubs, missions to seamen and about 1,500 miners' welfare trusts) which had previously been regarded as clearly charitable.

Charitable status carries with it important fiscal privileges in relation to income tax, stamp duties and rates. The privileges include exemption from income tax, and the right to claim from the Revenue repayment of income tax deducted at source from the charity's income, *e.g.*, from dividends or interest earned by invested funds and from annual subscriptions paid under "seven-year" covenants. For the organisations and trusts affected by the doubts arising out of the *Baddeley* case the possible loss of these privileges was serious [10]; and they and their supporters were quick to demand legislative intervention and to organise effective political pressure for that purpose. The result is the Recreational Charities Act, 1958.[11]

The Act does not attempt a new general definition of "charity." Section 1 merely provides that "it shall be and be deemed always to have been charitable to provide, or assist in the provision of, facilities for recreation or other leisure-time occupation, if the facilities are provided in the interests of social welfare." This is subject to a proviso which preserves the principle that a trust or institution cannot be charitable unless it is for the public benefit; and (see s. 1 (2)) the requirement that the facilities must be provided in the interests of social welfare is not satisfied unless:

> "(*a*) the facilities are provided with the object of improving the conditions of life for the persons for whom the facilities are primarily intended; and
>
> "(*b*) either—
>
> (i) those persons have need of such facilities as aforesaid by reason of their youth, age, infirmity or disablement, poverty or social and economic circumstances; or
>
> (ii) the facilities are to be available to the members or female members of the public at large."

This statutory test of "social welfare" is worth quoting in full because it is ingenious and because most of the parliamentary discussion was concerned with the merits and effectiveness of the test. Criticism was levelled at the vague words "improving the

[10] But not, surely, serious enough to be described as a threat of extinction (*cf. Hansard*, H.C., Vol. 582, cols. 320, 327, 332). After all, the question as to what privileges (if any) shall be accorded to charities is capable of different political answers in different countries. Not every state allows exemption from tax to charities.

[11] 6 & 7 Eliz. 2, c. 17.

conditions of life " in paragraph (*a*), and at the special reference to women in paragraph (*b*) (ii). The special reference to women was intended to cover women's institutes and ensure that they were included in the bodies which the Act declares to be charitable. It is odd that facilities provided for men and women or for women only should be able to satisfy the statutory test, whereas facilities provided for men only are necessarily unable to do so; but that is the effect of the special reference to women; and no satisfactory explanation of it was given in Parliament. As was pointed out in the House of Lords,[12] there is now a risk that women's clubs of a character very different from women's institutes may be able to claim, or even to alter their constitutions in order to claim, charitable status under the new Act and the fiscal privileges that go with that status.

In section 1 (3) facilities provided at village halls, community centres, women's institutes and recreation grounds are expressly mentioned as examples of what the Act declares to be charitable. The draftsmen presumably thought this necessary in order to ensure that their ingenuity in devising a test of social welfare should not be misunderstood.

The rest of the Act calls for little comment. Miners' welfare trusts set up before December 17, 1957 (the day after the first reading of the Bill in the House of Lords), are expressly declared charitable (s. 2). Past transactions affecting trusts validated by the Act are the subject of special saving provisions; and the ordinary time-limits for claiming repayment of income tax and excess stamp duty are extended (s. 3). The Parliament of Northern Ireland is empowered to pass similar legislation (s. 4). The Act binds the Crown (s. 5).

In Scotland many of the organisations which this Act declares charitable were already clearly charitable [13]; but for certain purposes, *e.g.*, for income tax purposes,[14] statutory references to charity have to be interpreted, even in Scotland, in accordance with English law; and section 6 (2) of the present Act therefore provides that sections 1 and 2 of the Act shall affect the law of Scotland (and Northern Ireland) only in so far as they affect the operation of the Income Tax Acts or of other enactments in which references to charity are to be construed in accordance with English law.

For the organisations and trusts affected this Act is a welcome relief from uncertainty and the fear of losing fiscal privileges. The draftsmen have attempted to achieve this while preserving the existing law as to the meaning of " charity " and, even, the decision

[12] *Hansard*, H.L., Vol. 207, col. 242.

[13] In Parliament a Scottish M.P. suggested scrapping the Recreational Charities Bill and adopting the law of Scotland as being " in this regard very much superior to the law of England " (*Hansard*, H.C., Vol. 582, col. 1074).

[14] *I. R. C.* v. *City of Glasgow Police Athletic Association* [1953] A.C. 380.

in the *Baddeley* case itself. Future judgment may well be that the draftsmen were set an impossible task. It will be no cause for surprise to those accustomed to the legal problems of charitable organisations if the new Act turns out to be a fruitful source of borderline cases and new litigation.

Leolin Price.

NOTES OF CASES

D. P. P. *v.* Head: A Question of Policy[1]

It is clear that the decision of the House of Lords, reported *sub nom. Director of Public Prosecutions* v. *Head*,[2] is of exceptional public importance even though it turns on the construction of a particular statute and is complicated by serious differences of opinion dividing some of their Lordships. One feature of the decision is worth noting at the outset: although Lord Denning disagreed significantly with the conclusions reached by the Court of Criminal Appeal and with many of the views of the majority in the House of Lords, he nevertheless concurred in dismissing the appeal on the ground that it would be unfair to the respondent to reverse an acquittal on a point of law which had not been adequately argued in the lower court. Whether or not one agrees with Lord Denning regarding the merits of the point in question, it is difficult to disagree with this type of approach. Although the Divisional Court can, and does freely, reverse acquittals, it is clearly much more serious for the House of Lords to do so and, indeed, it is questionable in principle whether a successful appeal in the House of Lords against the reversal of a conviction should ever affect the liberty of the respondent.[3] One may respectfully suggest that if the Court of Criminal Appeal were more accustomed to delivering reserved judgments in obviously appropriate cases, this particular

[1] See further an article in [1958] Crim.L.R. pp. 279–289, by an anonymous author, entitled "D. P. P. *v.* Head: A Question of Proof."

[2] [1958] 1 All E.R. 679; also reported [1958] 2 W.L.R. 617. The case raises, in an acute form, the problem relating to the exercise of a veto by the Attorney-General of the right to appeal in criminal cases to the House of Lords. There are at least two decisions of the Court of Criminal Appeal in the last year, *R.* v. *Vickers* [1957] 2 All E.R. 741 and *R.* v. *Spriggs* [1958] 1 All E.R. 300, leave to appeal against which was refused to a convicted person, which many believed deserved a priority equal to that accorded to *R.* v. *Head*. It is, therefore, particularly unfortunate that the first criminal appeal to be heard by the House of Lords for some time is not an appeal against a conviction sustained by the Court of Criminal Appeal but an appeal against the reversal of a conviction by that court in face of the arguments of the Attorney-General. Although the closeness of his connection with the conduct of the case must inevitably sharpen his appreciation of its importance, it is difficult to see how the present system can expect the Attorney-General adequately to dissociate his functions of Crown Prosecutor and impartial judge of the right to appeal, and how he can even give the appearance of being a disinterested party in deciding whether to allow an appeal to go forward.

[3] That it may be necessary to allow the law to be clarified by their Lordships is undeniable: the usual argument in favour of abolishing the jurisdiction of the House of Lords is obviously much stronger with regard to the civil jurisdiction of their Lordships than to their criminal jurisdiction. In practice, appeals against the reversal of a conviction are extremely rare and, even if successful, are not necessarily fully effective; see, *e.g.*, the practice adopted in *D. P. P.* v. *Beard* [1920] A.C. 479.

problem, as well as the more general problem regarding the exercise of the Attorney-General's fiat,[4] would hardly ever arise in practice.

In Viscount Simonds' words, " The bald facts of the case are that the respondent was charged with having had carnal knowledge of a woman who was placed out on licence from an institution for mental defectives, contrary to section 56 (1) (*a*) of the Mental Deficiency Act, 1913. He was convicted, but on appeal the conviction was quashed . . . on the ground that the woman was not lawfully detained in the institution." [5] The relevant part of the section, which has now been replaced by section 8 of the Sexual Offences Act, 1956, states that a misdemeanour is committed by any person who " (a) unlawfully and carnally knows, or attempts to have unlawful carnal knowledge of, any woman or girl under care or treatment in an institution or certified house or approved home, or whilst placed out on licence therefrom or under guardianship under this Act." A further proviso, to the effect that it is a good defence if the accused proves that " he did not know and had no reason to suspect, that the woman or girl was a defective," was not relevant to the facts of the case since Head admitted an act of intercourse following warnings that the girl concerned was out on licence from an institution for mental defectives.

At the Carlisle Assizes, Head was convicted despite the fact that the medical certificates, required by section 9 of the Act for the satisfaction of the Home Secretary before he could make an order transferring the girl to an institution, were both defective, since neither showed that she " required care, supervision, and control for the protection of others." Hinchcliffe J. held that the order was conclusive and the defence could not go behind it. The purported licence permitting her to be absent was not put in evidence.

In the Court of Criminal Appeal, the conviction was reversed.[6] It was stated that the order was invalid because of the defects in the certificates, even though it had been relied on for some ten years, and Lord Goddard added that had the girl applied at any time for certiorari or habeas corpus, she would have been immediately discharged. Although the relevant paragraph did not, like the subsequent paragraphs, refer to " a defective," but instead to " any woman or girl under care or treatment in an institution or . . . out on licence therefrom," the concluding words of the paragraph, " under this Act," had to be read distributively and Head could only be convicted if the girl was lawfully " under care or treatment in an institution or . . . out on licence therefrom." " The prosecution was never competent from the outset, since the woman lacked the necessary status to bring section 56 into operation." [7]

[4] *Supra*, n. 2.
[5] [1958] 1 All E.R. 679, at p. 681.
[6] [1957] 3 All E.R. 426.
[7] *Ibid.*, at p. 430, *per* Donovan J.

Unfortunately, there is, as the House of Lords pointed out, a basic flaw in this reasoning since the words "under this Act" cannot be read distributively: "the presence of the words 'or approved home' negatives this (distributive) construction as there is no machinery anywhere in the Act for placing anyone in an approved home by order or in any other manner."[8] Nevertheless, all their Lordships except Lord Denning found, for a different reason, that the girl was unlawfully detained.

Viscount Simonds, on the one hand, did not pursue this point since he held that it did not invalidate the case for the Crown: the section merely imposed a burden on the prosecution of proving that the girl was a person in fact receiving care or treatment in an institution or out on licence therefrom. It did not impose the additional burden of proving that she was lawfully detained and he, therefore, would have upheld the appeal. Although this construction has many obvious merits, it is respectfully suggested that it would have been more apt if Head had committed an act of intercourse with the girl whilst she was detained in the institution and not after she had been released from it. Admittedly, though the section indeed assumes legality of proceedings, it makes no explicit mention of the lawfulness either of the detention or of the licence. But, it is submitted, the two expressions, "under care or treatment in an institution" and "whilst placed out on licence therefrom" may well be said to be open to significantly different constructions. The former, as Viscount Simonds recognised, may perhaps include lawful or unlawful detention since, whatever it assumes, it ostensibly merely requires actually being under care or treatment, whereas it is difficult to deny that the latter necessarily presupposes a valid licence. If, as the majority of the House of Lords apparently believed, the purported licence was void and did not constitute a licence within the meaning of the Act, the girl was merely at large and the sections could not apply. If, on the other hand, the licence, though indirectly based on defective certificates, was not completely ineffective for all purposes then, as Lord Denning held, the girl might not lack the necessary status to bring section 56 into operation. In any event, the two expressions were construed alike by all their Lordships and the act of intercourse was committed only after the girl's release from the institution.

The majority of their Lordships, Lords Reid, Tucker and Somervell, whilst not conceding that there was an onus on the prosecution to prove by production of all the documents involved that the girl was lawfully detained, held that it would be fatal to its case if it were clearly established that she was unlawfully detained. Although production of the licence alone (which in fact was never produced) raised a prima facie presumption that she was lawfully out on licence, "the foundation of the presumption . . . is the

[8] [1958] 1 All E.R. 679, at p. 686, *per* Lord Tucker.

legality of the detention and the necessity for a licence to justify the patient's absence and if . . . on the face of the documents produced and received in evidence without objection, the detention was illegal, the whole basis of the subsection and the presumption of defectiveness goes and the prosecution must fail." [9] It has already been suggested in the *Criminal Law Review* that " The ' whole basis of the subsection ' is, not the legality of the woman's detention, but the fact that she is a mental defective," [10] and it is interesting to note that the Attorney-General was at one time inclined to accept the burden of proving that fact as the onus on the prosecution, though the House of Lords unanimously disagreed with him on this point. Whatever may be the " whole basis of the subsection," which in any event is open to doubt, and whether or not production of the licence should raise a sufficient presumption of legality to transfer the onus of proof to the accused, it is submitted that the crucial question turned, as Lord Denning recognised, on the exact effect of an apparently valid licence which was based on an order itself based on two defective certificates. The most questionable aspect of the majority judgment of the House of Lords and of the unanimous judgment of the Court of Criminal Appeal is that both assumed, without full consideration, that because the certificates were defective and the girl could have secured her release by other proceedings, the licence was completely ineffective for the purposes of the present proceedings.

Lord Denning's judgment, which at least does not suffer from this defect, falls more obviously into two parts. First, he said, the onus on the prosecution is that of proving that the girl was lawfully detained, and this is not satisfied by proving the fact of detention and then relying on a presumption of legality. " When the legality of the detention has to be proved in a court of law, the document itself must be produced. It is the best evidence and nothing less will do." [11] This means, in an ordinary case, that the prosecution must " call the medical superintendent to produce the original order for detention and the continuation orders and, in addition, if the woman has been placed out on licence, to prove that fact." [12] In this respect Lord Denning agreed with Lord Goddard in the Court of Criminal Appeal and, although the numerous authorities cited in support are more relevant to actions brought by persons alleging their own unlawful detention than to actions such as the present, where the accused alleges that another person was unlawfully detained, there seems to be much force in the argument that " The reason why these orders are admissible is because they are in the nature of proceedings *in rem*. They affect the status of the

[9] *Ibid.*
[10] [1958] Crim.L.R. 279, at p. 287.
[11] [1958] 1 All E.R. 679, at p. 688.
[12] *Ibid.*, at p. 690.

individual and her capacity " and " are, therefore, made admissible in evidence against all the world." [13]

By far the more crucial and debatable is Lord Denning's second point that the original order was not void but only voidable since it was made by the Home Secretary, not outside his jurisdiction, but in wrongful exercise of it. " His error is a wrong exercise of a jurisdiction which he has and not a usurpation of a jurisdiction which he has not . . . If that error appears on the face of the record—as it is said to do here—it renders the order liable to be quashed on certiorari but it does not make it a nullity." [14] The consequences of the distinction are profound: " If the original order was only voidable, then it would not be automatically void . . . There would have to be an application to the High Court for certiorari to quash it. The application would have to be made by the person aggrieved . . . and not by a stranger; and she would have to make it within six months unless the court extended the time. And being only voidable, the court would have a discretion whether to quash it or not." [15]

This is undoubtedly a question of great importance, affecting not merely alleged mental defectives but reaching into many other areas of law and affecting, for example, persons concerned with all types of orders, licences and warrants. The distinction between void and voidable is a familiar one and, with good reason, features particularly prominently in the law of contract. In domestic relations there is a vital difference between a void " marriage " and a voidable marriage, which may be directly relevant to prosecutions for bigamy. In the field of administrative law, it may be important, as Lord Denning stressed, that the public in general, and officials in particular, can rely on the validity of such documents without the risk of subsequent litigation and, perhaps, prosecution. As the article in the *Criminal Law Review* points out, there may be authority for this approach, which does not even touch directly on the distinction between void and voidable, particularly in Lord Radcliffe's words in another recent case: " This argument is in reality a play on the meaning of the word nullity. An order, even if not made in good faith, is still an act capable of legal consequences. It bears no brand of invalidity on its forehead. Unless the necessary proceedings are taken at law to establish the cause of invalidity and to get it quashed or otherwise upset, it will remain as effective for its ostensible purposes as the most impeccable of orders." [16]

There is, however, another side to the picture which, perhaps, was obscured for Lord Denning by the actual facts of the case, particularly since there was more than one continuation order which

[13] *Ibid.*, at p. 689.
[14] *Ibid.*, at p. 693.
[15] *Ibid.*, at p. 692.
[16] *Smith* v. *East Elloe R. D. C.* [1956] A.C. 736, at pp. 769–770.

was the result "of an independent decision freshly made after the most careful consideration." This concerns, not the protection of the public and officialdom, but of the individual directly affected by the order, licence or warrant. On Lord Denning's view, there would be no right of recovery against the Home Secretary for the ten years of detention and apparently there should be no right. The defect in the certificates is treated as a procedural rather than as a substantive matter: "The trouble with the two certificates may be, therefore, not in a faulty diagnosis but in the bad expression of (the doctors') reasons." [17] But the onus on the Home Secretary when he orders a person to be detained in an institution is deliberately made a heavy one, and if the certificates in fact do not disclose that there are sufficient grounds for detention, it should surely be no defence to argue that the fault might merely be one of expression. As Lord Somervell stated, "it might . . . be maintained that they (the certificates) afford no evidence on which the order made could validly have been based." [18] Where there may have been no evidence on which to base the order, it is playing with words to say that it amounted to a wrongful exercise of jurisdiction rather than to a usurpation of jurisdiction: the Home Secretary cannot order the girl's detention unless she is shown in the certificates to require "care, supervision and control for the protection of others." The fact that the continuation orders "were not made by automata with a rubber stamp" [19] is, with respect, not sufficiently convincing, however conscientiously the doctors performed their duties. Once the girl has been detained, the harm has been done and there must, thereafter, be some factual presumption of continuation. Moreover Lord Denning's view appears to mean that a person, who has been arrested on a warrant—even if the error appears on the face of the record—commits an offence by escaping from custody or by resisting arrest when there are no grounds whatsoever for his detention and even though the warrant was issued in bad faith or on no evidence. It may not be enough, it is submitted, to argue that in due course the licence or order or warrant can be set aside. It is true that "There are many cases in the books where mistakes have been made by medical men in filling in the certificates leading to detention orders. Sometimes it happens through an oversight, sometimes through carelessness, sometimes through misapprehension as to the legal obligation. Very often it is a highly technical ground." [20] But it is equally true that the onus on such persons, when they ensure that a person will be detained, is a weighty one and has been deliberately made such by Parliament. Carelessness, oversight and misapprehension should perhaps be no excuse for failure to perform properly a

[17] [1958] 1 All E.R. 679, at p. 691.
[18] *Ibid.*, at p. 687.
[19] *Ibid.*, at p. 692, *per* Lord Denning.
[20] *Ibid.*, at p. 693, *per* Lord Denning.

function of this nature and it is somewhat inconsistent with Lord Denning's usual approach to the rights of the individual that he should make them appear such.

Whether or not the distinction between void and voidable should be imported into this field of law is a difficult problem which deserves much closer attention than the majority of their Lordships were prepared to accord it. Equally, it deserves, with respect, a more even treatment than Lord Denning's. It may be, on balance, that his Lordship's conclusions were sound, quite apart from resting on some authority, but it is difficult not to conclude that they were too greatly influenced by the peculiar facts of the case, including the reprehensible conduct of the respondent and the history of the girl.[21]

There are many other features of the case which merit much fuller consideration in the future. One of these may be cited in conclusion: even if the girl was unlawfully detained, could Head have been convicted of attempting an offence under the section? Students of criminal law may be more familiar with the problem in another form: can one attempt to steal one's own umbrella? [22]

S. Prevezer.

The Psychopath and the Defence of Diminished Responsibility

One of the major questions facing the courts in applying the new defence of diminished responsibility in murder cases has been the question whether to recognise the condition known as psychopathic personality as being sufficient to satisfy the criterion of diminished responsibility. There is some doubt whether the Scottish courts, who invented the notion of diminished responsibility as a defence, will recognise the psychopath, though the Royal Commission on Capital Punishment clearly thought it should be recognised.[1] The terms of section 2 of the Homicide Act, 1957, define diminished responsibility as "such abnormality of mind (whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury) as substantially impaired his mental responsibility for his acts and omissions in doing or being a party to the killing." The phrase in brackets (which has been borrowed without amendment from the Mental Deficiency Act, 1927) was apparently introduced in order to exclude from the ambit of this defence persons who committed murder as a result of sudden outbursts of passion or rage, but who were not otherwise mentally abnormal.[2]

[21] The present writer is particularly indebted to his colleague Mr. D. J. Payne of University College, London, for a stimulating argument on this subject.

[22] See, particularly, the fullest and best discussion of attempts to commit impossible crimes in Williams, *Criminal Law, The General Part* (1953), at pp. 487–503.

[1] See Cmd. 8932, September, 1953, p. 139, para. 401.

[2] See remarks of the Home Secretary and the Attorney-General in the House of Commons debates on the Bill, H.C.Parl.Deb. (5th series) Vol. 560, col.

There have already been a number of reported cases involving psychopaths where the interpretation of the section has been considered by the courts. The first was *R.* v. *Dunbar*,[3] where a young man of 24 broke into the house occupied by an old lady of 82 who was very deaf, and entered the room where she was sleeping, in search of money. She awoke, and the appellant, thinking she had recognised him, picked up a lemonade bottle and attacked her with it, causing serious injuries from which the old lady died. At the trial of the youth for murder, there was no dispute that he was responsible for the killing or that it was done in the course of theft. The only defence raised was that Dunbar was at the time suffering from diminished responsibility. This issue was left to the jury, who found the appellant guilty of capital murder, and he was sentenced to death. He appealed on the ground that the trial judge misdirected the jury on the standard of proof required of the defence on the issue of diminished responsibility; the appeal was successful, it being held that the learned judge should not have left the issue to the jury in the way he did, telling them nothing more than to apply the words of the relevant section of the Act, and that the burden was placed by the Act fairly and squarely on the defence, and that they must be satisfied that the defence had proved diminished responsibility. It is true that section 2 (3) of the Homicide Act, 1957, says no more than that "On a charge of murder it shall be for the defence to prove that the person charged is by virtue of this section not liable to be convicted of murder." All the same, the trial judge should have told the jury that the burden was to establish the condition of diminished responsibility on a balance of probabilities, and that it was not necessary to prove it beyond reasonable doubt. This is already the position with regard to a defence of insanity,[4] and the Attorney-General (who intervened on the appeal) conceded that the same rule should apply to a defence of diminished responsibility.

It will be observed that this decision turned upon the technical point concerning the burden of proof on the defence, and the fact that the mental condition alleged to be involved was psychopathy was irrelevant to the result. It is perhaps of some interest to note that there was a conflict of evidence over the question of diminished responsibility, the defence psychiatrist regarding the prisoner as definitely a psychopath "although the evidence which he gave was of a somewhat vague description," while the prison doctors were firmly of the opinion that he was not a psychopath.

The case of *Vickers*[5] bears a striking resemblance to the facts of *Dunbar* in that it involved killing an old lady who was deaf but nevertheless discovered him in the cellar, whereupon he killed her

1156, November 15, 1956; and col. 1254. Also Vol. 561, cols. 320–321, November 27, 1956.

3 [1957] 3 W.L.R. 330.

4 See the case of *R.* v. *Carr-Briant* [1943] K.B. 607.

5 [1957] 3 W.L.R. 326. Noted in (1957) 20 M.L.R. 633.

in order to prevent recognition and subsequent identification. But in this case no question of diminished responsibility was raised.

The next case is *R.* v. *Spriggs*,[6] where a young man who was incensed by the conduct of a barman at a public-house who had turned him out because he was interfering with some barrels and the fittings, came back later and shot the barman with a revolver, and fired two more bullets which killed his victim as he lay on the ground. The defence put forward was that the accused was suffering from diminished responsibility, being emotionally unstable and a psychopathic personality. The jury rejected this defence and Spriggs was convicted of capital murder and sentenced to death. The appeal was based on the ground that the trial judge had given insufficient guidance to the jury concerning the nature and scope of the defence of diminished responsibility, especially in the light of the prosecution's contention that this was limited to deficiency of intellect and could not include the various types of mental condition from which the accused had suffered for a long time. It was put by the prosecution that the appellant had a high intelligence quotient and could not therefore be suffering from abnormality of mind. But there was medical evidence which showed that there was a lack of ability on his part to control his emotions, and it was contended for the defence that such a person came within the ambit of the section. He was a psychopath, all the medical evidence was that he was suffering from abnormality of mind to some degree, and it was said that a person could be normal intellectually, but thoroughly unstable emotionally and of diminished responsibility. The Court of Criminal Appeal held that the trial judge had taken the correct course in leaving the question to the jury to decide in the light of the terms of the section, which was supplied to them. It was not necessary for him to explain or elaborate on the language used by Parliament, even though different interpretations were advanced by the prosecution and the defence. "It is not for judges to re-define or to attempt to define the definition" (p. 165). There is no need to recapitulate the criticism already made in this journal of this decision.[7] It would appear that section 2 (1) is to be left to the jury without further explanation, notwithstanding that it would be a misdirection to leave section 2 (3) to them in the same way (*Dunbar*). Lord Goddard observed that there was in this case evidence which might have justified the jury finding diminished responsibility, on a proper direction, but the evidence was not such as to compel them so to find—there was evidence on the other side. In these circumstances "we cannot see that a judge dealing with this matter can do more than to call the attention of the jury to the exact terms of the section which Parliament has enacted and leave them to say

[6] [1958] 2 W.L.R. 162. Noted in (1958) 21 M.L.R. 318.
[7] See 21 M.L.R. 318.

whether upon the evidence they are satisfied that the case comes within the section or not."

The case of *R.* v. *Matheson* [8] is the first reported case where the nature of psychopathic personality has been directly considered in relation to the defence of diminished responsibility; and when one adds that it was decided by a full court of the Court of Criminal Appeal, and the judgment was reserved, the importance of the case will be appreciated. *Dunbar* and *Spriggs* turned on the proper direction to the jury on the burden of proof and on the nature of the defence. *Matheson* shows that it is the duty of the jury to accept unanimous medical testimony of diminished responsibility in the case of a feeble-minded psychopath, where there is no evidence the other way. Matheson was a man of 52 who murdered a boy of 15 in the most horrible circumstances imaginable. The accused was a confirmed sodomite with a long history of extreme sexual abnormality. There was evidence of a homosexual relationship between him and the boy. One evening the boy did not return home from work. Having collected some wages which were due to him from a former employer, he left the place of his new employment at about 4.30 p.m., and was never seen again alive. Four days later his body was recovered from the drain of a boxing hall where Matheson was employed. In the meantime Matheson had sent the most cruel anonymous postcards to the boy's mother and a letter to the Chief Constable. He gave himself up to the police in Glasgow and described how he had killed the boy with a bottle which he had filled with water for this purpose, also using a hammer. He alleged that the boy wanted more money as the price of buggery. He also said he knew the boy would have his week's pay on him, and that was why he killed him. He was prosecuted and convicted of capital murder (killing in the course of theft). The defence was diminished responsibility, and this was supported by the unanimous testimony of three medical witnesses called by the defence. The prosecution did not challenge the opinions they had formed. Nevertheless the jury found a verdict of guilty of capital murder, and he was sentenced to death. He appealed on the ground that the verdict could not be supported by the evidence, either on the issue of diminished responsibility or on the issue whether the killing was committed in the course or furtherance of theft. The appeal being allowed on the first ground, it became unnecessary to consider the second ground. A full court of five judges having been convened to hear this appeal, the Court of Criminal Appeal decided that the verdict of the jury must be set aside on the ground that it was unsupported by the evidence, having regard to the unanimous medical testimony in favour of diminished responsibility. A verdict of manslaughter was substituted, and a sentence of twenty years' imprisonment imposed. The court

[8] [1958] 1 W.L.R. 474; also reported [1958] 2 All E.R. 87.

reserved the reasons for its decision, and Lord Goddard C.J. delivered the judgment.

The crucial point was that the medical evidence was overwhelming, and there was no evidence to the contrary. All the three medical witnesses agreed that the accused was not insane within the M'Naghten Rules, yet all three agreed that his mind was so abnormal as substantially to impair his mental responsibility for his acts. He had a low intelligence quotient, and was described as having the mind of a boy of ten. The evidence was clear enough to shift the burden of proof from the shoulders of the defence to the prosecution, yet no medical evidence was given by the prosecution in rebuttal. One of the medical witnesses for the defence was the Senior Medical Officer at Durham Gaol.

The court was careful to point out that, despite this overwhelming medical evidence, there might well have been facts which entitled the jury to come to a contrary conclusion. It is still the law that it is for the jury to decide, and not for medical men however eminent, and Lord Goddard went through the evidence to see if there was anything on which the jury could have found the accused "normal." The fact that there was evidence of premeditation had been suggested, but, said the learned Lord Chief Justice, this was not evidence of normality, for "an abnormal mind is as capable of forming an intention and desire to kill as one that is normal; it is just what an abnormal mind might do. A desire to kill is quite common in cases of insanity."[9] Again, the fact that the accused sent the anonymous letters did not displace the view that his mind was abnormal; in fact they tended to confirm it. There was in fact no evidence on which the jury could find he was anything else but mentally abnormal. While it was quite understandable that they should come to the conclusion that such a creature ought not to live, and that a capital verdict was the only one appropriate, and the court was not prepared to say their decision was unreasonable, it was nevertheless the case that it was unsupported by the evidence. The Criminal Appeal Act, 1907, gave these two alternatives as grounds on which a jury's verdict could be upset, and the second was applied to the present case.

It is submitted that the following conclusions emerge from this decision: (1) That a feeble-minded person with a psychopathic personality may be found to be suffering from diminished responsibility where there is overwhelming medical evidence and no evidence the other way. (2) The case does not indicate with any certainty what view would be taken of a psychopathic personality of normal or ordinary intelligence.[10] Evidence of a normal intelligence quotient or the absence of perversions and strange letters might be sufficient "other evidence" on which a jury would be entitled to reject unanimous medical opinion. (3) It follows

[9] *Loc. cit.*, page 478.
[10] Such as Spriggs would appear to have been.

a fortiori that if the medical evidence is not unanimous [11] it will be exceedingly difficult for the appeal court to interfere with the jury's decision. It is most important for the doctors to agree about psychopathic personality; likewise insanity under the McNaghten Rules. When they are divided it is almost hopeless; when they agree there is at least some hope.

Perhaps some more general reflections about this case may be permitted. It is indeed a truly remarkable decision. Who could have prophesied a few years ago that we would witness a case where, to quote the headline in *The Times* law report,[12] "five judges decide 'monster' shall live"? Yet the defence of diminished responsibility has worked this miracle. It is a solemn thought that but for this defence a man like Matheson would have been found responsible in the eyes of the law. Whether he would have been executed is doubtful, but there can be little doubt that some psychopaths who had not the advantage of Matheson's feeble-mindedness and extreme sexual perversion have in fact been executed in the past. The case of *Rivett* [13] comes readily to mind. This fate still remains a legal possibility for the high-grade psychopathic personality. It is anybody's guess what the fate of such a person may now be, if he commits murder. The case of *Matheson* gives a promising and sympathetic lead in the direction of recognising psychopathy. But at the trial, a great deal will depend on the medical evidence. If this is unanimous in favour of diminished responsibility, the judges may in the absence of other evidence be able to control jury decisions along the same lines as in *Matheson*. If it is not unanimous, or if there is other evidence pointing to normality, that may, in more senses than one, be fatal.

Two additional points come out of *Matheson*. A rule of practice has been laid down to the effect that a plea of guilty to manslaughter on the ground of diminished responsibility should not be accepted—the issue must be left to be decided by the jury, as in the case of a plea of insanity.[14] Moreover, if the defence of diminished responsibility is raised in conjunction with some other ground such as provocation, and the verdict is manslaughter, then the judge may, and generally should, ask the jury whether their verdict is based on diminished responsibility or on the other ground or both. Presumably this is in order to assist him in deciding what sentence is appropriate, and it seems a very sensible procedure. It has already been adopted in one case at the Central Criminal Court.

J. E. HALL WILLIAMS.

11 As, for example, in *Dunbar*.

12 *The Times* newspaper, March 25, 1958.

13 (1950) 34 Cr.App.R. 87.

14 This is not apparently the practice in Scotland, where a plea of guilty to culpable homicide may be accepted: *Kirkwood* v. *Lord Advocate*, 1939 S.C.(J.) 36.

SALE OF GOODS—INNOCENT MISREPRESENTATION—SEDDON'S CASE

IN *Long* v. *Lloyd*,[1] the sale of goods contract induced by a material innocent misrepresentation once again presented to the courts the issue of when the buyer in such a case loses his right of rescission. Once again, the Court of Appeal was able to decide the case before it without settling plainly and finally whether it is the law of England that the right to rescind is lost once the sale of goods contract has been executed, the so-called rule in *Seddon's* case [2] (in its sale of goods aspect). On the other hand, the court's exercise of its equitable discretion in refusing rescission is of the utmost interest and importance.

Rescission for innocent misrepresentation is an equitable remedy and therefore at the discretion of the court. This discretion is normally exercised with reference to two main factors, the vesting of third party rights (if any) and the exercise of reasonable vigilance by the misrepresentee in pursuing his right to rescind. It is worth emphasising that the so-called rule in *Seddon's* case is a rule that forms part of the general law of innocent misrepresentation in contract. In those very few transactions in which the rule in *Seddon's* case has been held to apply, it has the effect of displacing the original discretion of the courts by an inflexible rule of convenience. But, as already indicated, the courts have not abandoned their discretionary powers lightly or frequently.

In the case of title to land, execution of the contract was established as the point of no return over a century ago in *Wilde* v. *Gibson*.[3] The rule in *Wilde* v. *Gibson*—as the rule about rescission for innocent misrepresentation in respect of land transactions may properly be called—was later extended to overt corporeal misdescriptions of landed property and—controversially—to latent physical defects in the case of a leasehold in *Angel* v. *Jay*.[4] With the possible exception of the *Angel* v. *Jay* situation, good arguments for halting the right to rescind at the moment of completion of title have been advanced in the case of transactions in land.[5]

Again, in *Seddon's* case itself, Joyce J. held that the rule in *Wilde* v. *Gibson* was applicable also to a contract for the purchase of an entire company and its business through the purchase of its

[1] [1958] 1 W.L.R. 753. Also reported in [1958] 2 All E.R. 402. It is understood that no appeal is going forward to the House of Lords.

[2] [1905] 1 Ch. 326. I say "so-called," because it is McCardie J.'s restatement in *Armstrong* v. *Jackson* [1917] 2 K.B. 825, of what Joyce J. said in *Seddon's* case that is known as the rule in *Seddon's* case. Joyce J. himself merely stated the rule in *Wilde* v. *Gibson*, *infra*, but in such a way as impliedly to suggest its universal applicability. It is against this suggestion of universal applicability that the courts have subsequently and successfully struggled. For the most valuable discussion of the state of *Seddon's* case up to 1939, see H. A. Hammelmann's article in (1939) 55 L.Q.R. 90.

[3] (1848) 1 H.L.C. 605.

[4] [1911] 1 K.B. 666.

[5] Especially by Grove J. in *Clare* v. *Lamb* (1875) L.R. 10 C.P. 334, 338–339.

shares,[6] though whether making rescission conditional on non-execution of the contract serves an equally useful function in the case of this particular transaction is debatable.

As is well known, in the case of other types of transaction, like the contract of guarantee [7] or the purchase of shares direct from a company as on a first allotment,[8] the courts have refused to abridge their equitable discretion.

The pattern of judicial discourse, in the sale of goods cases, has been constantly to state the rule, constantly to criticise it, but never to apply it. In no other branch of the law of contracts, however, has the rule in *Seddon's* case and the law of innocent misrepresentation created so much confusion. This has resulted from the dual nature of sale of goods law.

By "dual nature" I mean, of course, that sale of goods transactions are governed by two main bodies of law, on the one hand, the specialised sale of goods law to be found in the Sale of Goods Act, 1893,[9] and the case law interpreting the Act as well as dealing with highly specialised sale of goods matters outside the Act, like bankers' commercial credits, and, on the other hand, the general law of contract, torts, etc., that happens to be applicable to sale of goods transactions. The purpose of section 61 (2) of the Sale of Goods Act is to co-ordinate the specialised provisions of the Act with the general law, in particular for our purpose, the general law of contract. This section 61 (2) does by providing, in effect, that in the event of a conflict between the Act and the general law the Act shall prevail.[10] Of all provisions in the Sale of Goods Act, however, section 61 (2) has been consistently ignored.

The dual nature of sale of goods law, the controversy about the rule in *Seddon's* case and the ignoring of section 61 (2) have combined to produce, in the field of sale of goods, a veritable study in conflicting rules and their reconciliation, which may be summarised in the following propositions:

I. Assuming that the innocent misrepresentation coincides with breach of a condition, whether implied or express, then:

(1) If the rule in *Seddon's* case does apply to the sale of goods, the buyer's right to rescind the contract, to reject the goods, may be subject to two possibly conflicting rules, *i.e.*,

(*a*) the rules about loss of the right to reject for breach of condition in section 11 (1) (*c*) and section 35 of the Sale

[6] There were two other grounds of decision, namely, that the misrepresentee had failed to show reasonable vigilance in pursuing his rights, and that, in any event, on the evidence, there was no misrepresentation.

[7] *Mackenzie* v. *Royal Bank of Canada* [1934] A.C. 468

[8] *Re Reese Silver Mining Co.* (1867) L.R. 2 Ch. 604; 4 H.L.C. 64; *First National Reinsurance* v. *Greenfield* [1921] 2 K.B. 272, especially at 272–273.

[9] Also, the numerous other statutes dealing mainly with the quality of particular kinds of commodities sold.

[10] "Common law" in section 61 (2) plainly includes equity. *Pace* the decision of the New Zealand C.A. in *Riddiford* v. *Warren* (1901) 20 N.Z.L.R. 572 (C.A.).

of Goods Act. Under these rules, the right to reject is normally lost on " acceptance " of the goods by the buyer, a conception that allows for a reasonable, though only a reasonable, opportunity to examine the goods. In addition, the right of rejection may be lost sooner in the case of an unconditional contract for the sale of specific goods where the property in those goods passes—unless *Varley* v. *Whipp*[11] is good law, in which event such "unconditional" contracts become virtually, if not quite, impossible and the sole rule governing rejection under the Act is acceptance;

(*b*) the rule in *Seddon's* case, that the right to rescind and reject the goods not for breach of condition but for the innocent misrepresentation is lost on execution of the contract, which, here, has the meaning of completion of title, *i.e.*, passing of the property in the goods.[12] Normally, therefore, if the rule in *Seddon's* case applied, the buyer would lose his right to reject according to the vagaries of the rules about the passing of property, which were never formulated to take into account the fair right of a buyer to have a reasonable chance of inspecting the goods delivered (leaving on one side the complication about unconditional contracts for the sale of specific goods).[13] In the context of sale of goods, the rule in *Seddon's* case clearly does not make commercial or any other sense, and it has doubtless been this feeling that has led to its severe criticism in the sale of goods cases and to its off-hand treatment in *Long* v. *Lloyd*.

The conflict between the Sale of Goods Act and the rule in *Seddon's* case could, of course, be resolved in favour of the Act by invoking section 61 (2), but such invocation would imply that the rule in *Seddon's* case does govern the sale of goods contract induced by innocent misrepresentation, which, to put it mildly, is the question.

(2) If, as is most probable, the rule in *Seddon's* case does not apply in the sphere of sale of goods, the buyer's right to reject may again be subject to two possibly conflicting rules, *i.e.*,

(*a*) the rules about loss of the right of rejection for

[11] [1900] 1 Q.B. 513.

[12] The meaning here of execution of contract in the sale of goods is not usually emphasised as it should be in the judgments. That it is the passing of the property follows by way of analogy with the rule in *Wilde* v. *Gibson*, *supra*, and it is so stated in *First National Reinsurance* v. *Greenfield*, *supra*, at p. 272. Equivocal statements, however, are to be found in *Armstrong* v. *Jackson*, *supra*, at p. 825, and in *Leaf* v. *International Galleries* [1950] 2 K.B. 86, at p. 91, suggesting that the crucial moment might be that of delivery simply, a rule that would be equally functionless.

[13] When the theory is that the opportunity to inspect occurs at the time of concluding the contract—a not wholly realistic assumption in modern times.

breach of condition under section 11 (1) (*c*) and section 35 of the Act, as already mentioned; and,

(*b*) the rules of equitable discretion with regard to rescinding a contract for innocent misrepresentation. The conflict between the general law of equity and the Act may break out because, theoretically, a court may exercise its discretion in favour of rescinding for innocent misrepresentation after the point of time at which the buyer, through his acceptance of the goods, has, under the Act, lost his right to reject for breach of condition.

In the light of the Act and the cases, it appears that this conflict may be resolved in three ways:

(i) by applying the "potency" rule laid down (possibly *obiter*) by Denning L.J. (as he then was) in *Leaf* v. *International Galleries*[14]: "an innocent misrepresentation is much less potent than a breach of condition; and a claim to rescission for innocent misrepresentation must at any rate be barred when a right to reject for breach of condition is barred."[15] The only criticism that can be made of this method of achieving a sensible solution is that the rule is based on a metaphor—the idea of potency, which is a quality alien to abstract legal concepts and which, as is usual with metaphorical statements of legal principle, tends to obscure the policy problem presented by the law;

(ii) by invoking section 61 (2). This is the neatest technical escape route from the dilemma, and amounts to saying that the law devised specifically for sale of goods contracts is likely to have a better answer to the problem of rejection than the law developed to cover all kinds of contract;

(iii) by applying as it were a variant of the old business maxim: "if you can't beat 'em, join 'em"; that is to say, eliminating the difference between the Sale of Goods Act and the rules of equitable discretion by equating the latter with the statutory rules about acceptance.

As to reconciliation method (iii), third-party rights create no difficulties: an act inconsistent with the ownership of the seller involves almost invariably the vesting of third-party rights sufficient to block equitable rescission for innocent misrepresentation.[16] And reasonable vigilance in exercising the right to rescind would almost seem to be cut from the same legal block as retaining the goods,

[14] *Supra*. Submitted to a penetrating analysis by Prof. L. C. B. Gower in (1950) 13 M.L.R. 362.

[15] *Supra*, pp. 90–91.

[16] If third party rejects, there is arguably in any case lack of reasonable vigilance in rescinding.

after the lapse of a reasonable time, without intimating to the seller that he (the buyer) has rejected them.[17] This solution by equation was clearly indicated in *Leaf's* case [18] and was given greatly added support by the nature of the court's decision in *Long* v. *Lloyd*.

To the facts and decision in that case I shall come in a moment, but, before that, a word about the second main alternative situation.

II. Assuming that the innocent misrepresentation coincides with breach of a mere warranty, which does not give rise to a right to reject under the Sale of Goods Act, then rescission will be governed solely by the general law of innocent misrepresentation.

Thus, if the rule in *Seddon's* case runs through the realm of sale of goods, the passing of property will determine the possibility of rescission, a senseless state of affairs. On the other hand, if, as is most likely, the rule in *Seddon's* case is excluded from the sale of goods, then the rules of equitable discretion will enable the courts to deal fairly with both parties. Here, again, the discussion of reasonable vigilance in *Long* v. *Lloyd* will be relevant.[19]

In *Long* v. *Lloyd*, there was offered for sale by a haulage contractor a 1947 Dennis 12/14 ton lorry described as in " exceptional condition." Plaintiff, another haulage contractor, saw the lorry and the seller made more representations, some general, some specific, about the good qualities of the vehicle. After a trial run on which it was discovered that the accelerator and top gear were somewhat defective, plaintiff agreed to buy for £750, giving a cheque for £375 on the spot. The following day, plaintiff set out from Sevenoaks in the lorry for Rochester to pick up a load. On the journey, the dynamo broke down and plaintiff also noticed that oil was leaking from the engine, one of the wheels was cracked and fuel consumption was much higher than as represented. Seller disclaimed knowledge of these defects and offered to pay half the cost of reconstructing the dynamo, which plaintiff accepted. Next day, the dynamo having been repaired, plaintiff's brother drove the lorry away with a four-ton load destined for Middlesbrough. On the journey, the lorry broke down from other defects, and, on examination by an expert, was pronounced unroadworthy in its existing condition. Plaintiff immediately wrote to the seller rejecting the lorry and claiming the return of his money. Both the court of first instance and the Court of Appeal dismissed his claim to rescind the contract on the ground of innocent misrepresentation.

In *Long* v. *Lloyd*, then, the question did not arise of resolving a conflict between the Sale of Goods Act rules about rejection and

[17] Sale of Goods Act, 1893, s. 35.

[18] *Supra*, pp. 91, 92 and 93.

[19] I respectfully and strongly agree with Prof. Gower's submission in his comment on *Leaf's* case, *supra*, that, in these sale of goods cases of rescission, as innocent misrepresentation goes, so should go fraudulent misrepresentation. The fraudulent element may be adequately recognised in the action for deceit, in connection with which the power to award punitive damages should not be overlooked.

the rules about rescission for innocent misrepresentation. No breach of condition in the sale of goods contract was alleged, nor is it easy to see that any had occurred. What was urged upon the court was that the rule in *Seddon's* case does not apply to sale of goods transactions and that the right to rescind for the innocent misrepresentation remained alive after the lapse of only a few days from the delivery of the lorry.

As in *Leaf* v. *International Galleries*, the court found it possible to avoid an out-and-out answer to the question of *Seddon's* case in the field of sale of goods. After citing the relevant criticisms and non-committal statements in *Leaf's* case and in *Solle* v. *Butcher*,[20] the court concluded by saying that plaintiff's argument "has not sufficed to resolve our doubts on the question of principle."[21]

Nevertheless, the court held, even if the right to rescind survived the completion of the contract, *i.e.*, the passing of the property in the goods, it had subsequently been lost, because, though no more than a few days had passed since delivery, the buyer had had an opportunity of inspection by an expert at the place of delivery, but had not availed himself of it, he had had a reasonable time to test the truth of the many representations made, but even after discovering their untruth, he had accepted the seller's offer to help towards putting the dynamo right (as if acknowledging that the lorry was now his), and, to crown all, he had then dispatched the lorry on a long business trip to Middlesbrough. "That step, at all events, . . . amounted, in all the circumstances of the case, to a final acceptance of the lorry by the plaintiff for better or for worse, and . . . conclusively extinguished any right of rescission remaining to the plaintiff after completion of the sale."[22] This reasoning is not far, if any space at all, from saying that the buyer's claim was barred for the selfsame reason as a right to reject is barred. The buyer had accepted the lorry.[23]

Much more clearly than in *Leaf's* case—and this is the legal importance of *Long* v. *Lloyd*—the reasonable vigilance a misrepresentee must display was given virtually the same interpretation with regard to the facts in the case as an act of acceptance within the Sale of Goods Act, s. 35.

If, then, one were asked to predict the future development of this part of the law, one would have increasing authority to say, first, that the rule in *Seddon's* case will finally be held not to apply to sale of goods transactions[24] because it serves no useful function

[20] [1950] 1 K.B. 671.
[21] *Supra*, p. 758.
[22] At p. 761.
[23] Adapting Denning L.J.'s words in *Leaf's* case, *supra*, at p. 91.
[24] In *Bevan* v. *Anderson and Peace River Sand and Gravel Co., Ltd.* (1958) 12 D.L.R. (2d) 69, Riley J., in the Supreme Court of Alberta, refused to apply the rule in *Seddon* to what the court treated as an executed contract of "partnership in the guise of a private company" (p. 73). The fact that the formation

there but is rather an obstacle to fair decisions, and, second, that termination of the right to rescind for innocent misrepresentation will be found to coincide with termination of the right to reject for breach of condition.[25] If this is a true prognostication, the way lies open to the courts to resolve the conflicts described above without the need for remedial legislation.

C. Grunfeld.

Misrepresentation — Opinion in Form — Statement of Fact

Brown v. *Raphael*[1] involved no more than an application of the principle stated by Bowen L.J. in *Smith* v. *Land and House Property Corporation*,[2] but it is not only an interesting modern illustration of the working of that principle but also of particular interest and importance at a time when the trend in the law is towards improving standards of integrity and accuracy in the negotiation of contracts.

The case arose out of the sale by auction of a certain lot described as "The absolute reversion receivable on the decease of a lady aged 69 . . . to the whole of a trust fund now represented by £8,000 2½ per cent. Consols, of estimated value £5,210. This sum has been set aside to pay an annuity of £200 per annum to the lady mentioned above. The trustee is the Public Trustee. *Estate duty will be payable on the death of the annuitant who is believed to have no aggregable estate.*"[3] This vitally important belief expressed in the final sentence was ill-founded. Its insertion was due to the honest ineptitude—as the court found—of the managing clerk who was entrusted with the drafting of the description by his firm.

On the strength of the description, plaintiff entered into a contract to purchase the reversion. Before the contract was executed, he discovered that a substantial aggregable estate for the purpose of estate duty in fact existed and sought to rescind. The Court of Appeal dismissed the claim by the sellers to enforce the contract on the plea of the material innocent misrepresentation.

The argument that the misrepresentation was no more than an expression of opinion was turned down, following the legal principle stated by Bowen L.J. in *Smith's* case in these terms:

> "It is material to observe that it is often fallaciously assumed that a statement of opinion cannot involve the

of the partnership company involved an executed "conditional sales agreement" did not impress Riley J. who, citing with approval Denning L.J.'s many criticisms of *Seddon*, concluded that there was "no logical reason" (p. 80) for prohibiting rescission for innocent misrepresentation of the overall agreement merely because it had been executed, the misrepresentee having repudiated as soon as he had sufficient knowledge of the true state of affairs.

25 Whether s. 61 (2) may be invoked is unpredictable.

1 [1958] 2 W.L.R. 647. Also reported in [1958] 2 All E.R. 79.

2 (1884) 28 Ch.D. 7.

3 [1958] 2 W.L.R., at p. 648.

statement of a fact. In a case where the facts are equally well known to both parties, what one of them says to the other is frequently nothing but an expression of an opinion. The statement of such opinion is in a sense a statement of fact, about the condition of the man's own mind, but only of an irrelevant fact, for it is of no consequence what the opinion is. But if the facts are not equally known to both sides, then a statement of opinion by the one who knows the facts best involves very often a statement of a material fact, for he impliedly states that he knows facts which justify his opinion." [4]

The Court of Appeal, in *Brown* v. *Raphael*, held that, though the misrepresentation there was couched in the form of an opinion, it embodied in the circumstances of the case a misstatement of fact.

C. Grunfeld.

Kuchenmeister Again

Mr. Carl Walter Kuchenmeister has now twice appeared in the Law Reports in cases concerning his personal liberty. In *The King* v. *Bottrill, ex p. Kuchenmeister* [1947] K.B. 41, Mr. Kuchenmeister mistakenly believing that the war with Germany was over, applied for his release from the detention to which he had been subjected during the last war as an enemy alien. In view of the fact that hostilities had ceased and Germany as a State had ceased to exist, his mistake was perhaps understandable. Unfortunately for him the Foreign Office declared the state of war still existed and the court, quite rightly, regarded itself as bound by this declaration.

In the recent case of *Kuchenmeister* v. *Home Office* [1958] 2 W.L.R. 453; also reported [1958] 1 All E.R. 485, Mr. Kuchenmeister has been more fortunate, and found the technicalities on English law operating in his favour. After his release from internment in March, 1947, he had taken up residence in Ireland, whilst still remaining a German national. On an aeroplane flight from Amsterdam to Dublin in 1955 his plane landed at London Airport where he had to transfer to another aircraft in order to complete his journey. At the time he was a person to whom the immigration authorities in this country had instructions to refuse leave to land, but this would not normally have caused any difficulties where the purpose of landing was merely to transfer from one plane to another. Unfortunately in this case the tarmac where the incoming plane landed was one mile distant from the tarmac where the outgoing plane was to leave, and there was nothing to stop anyone who was travelling alone between these two points from walking out of the airport. In these circumstances, when the plaintiff landed he was detained by immigration officers for two hours whilst instructions were sought over the telephone as to the best way of dealing with the matter. The result was that he missed his plane to Dublin that

[4] (1884) 28 Ch.D. 7, at 15.

night, and had to remain in the Airport Transit Lounge until he was eventually put on a plane for Dublin the next morning.

Under the provisions of the Aliens Order 1953 the immigration authorities enjoy extremely wide powers of control over the landing and embarking of aliens in the United Kingdom. Under Article 2(2) an immigration officer may give notice to an alien who is on board a ship or aircraft prohibiting him from landing without leave, or grant or refuse leave to land to an alien who is within the United Kingdom after landing without leave. Under Article 8 (4) an alien to whom leave to land is refused may be detained. However, Mr. Justice Barry found as a fact that at no time was the plaintiff refused leave to land, and accordingly the above provisions had no application to the present case. The article upon which the plaintiff relied, which the judge found to be applicable, was Article 2 (1), which provided that, subject to refusal to land, leave to land should not be required in the case of an alien who landed only for the purpose of embarking in an aircraft at the same port, and remained throughout the period between landing and embarking within such premises or limits as might be approved for the purpose by an immigration officer. The defendant contended that the last-mentioned provision gave the immigration authorities an unfettered discretion to prescribe the limits or premises within which the plaintiff could remain, and that in these circumstances the detention could not be unlawful. Mr. Justice Barry held, however, that the provisions of Article 2 (1) could not be used to frustrate the purpose for which the alien landed, namely, embarking on another aircraft to complete his journey. The immigration authorities could, if they wished, have justified the plaintiff's detention by utilising the wide powers conferred upon them by Article 2(2), but their discretion under Article 2 (1) was not so wide as to enable them to act in an unreasonable or capricious fashion.

The plaintiff was therefore entitled to recover damages. He did not contend that he had suffered any direct pecuniary loss, but "the very precious right of liberty . . . is one which must be protected." Accordingly the plaintiff was awarded damages of £150.

Thus Mr. Kuchenmeister, who was detained during a "war" which the man on the Clapham omnibus would certainly have regarded as ended, has subsequently been able to recover damages because the immigration authorities acted under the wrong Article of an Order which admittedly gave them almost unlimited powers of detention.

Denys C. Holland.

Limitation of Actions in Tort Against Personal Representatives

The Law Reform (Miscellaneous Provisions) Act, 1934, s. 1 (1), provides (subject to the exceptions there stated) that all causes of

action subsisting against or vested in any person at the time of his death shall survive against, or, as the case may be, for the benefit of, his estate. Section 1 (3) provided that:

> " No proceedings shall be maintainable in respect of a cause of action in tort which by virtue of this section has survived against the estate of a deceased person, unless either—
>
> (*a*) proceedings against him in respect of that cause of action were pending at the date of his death; or
>
> (*b*) the cause of action arose not earlier than six months before his death and proceedings are taken in respect thereof not later than six months after his personal representative took out representation."

There has been, since the passing of the Act, no authority as to whether the limitation period prescribed by section 1 (3) (*b*) excluded or complemented the general limitation period for actions in tort. This is the problem which confronted the Court of Appeal in *Airey* v. *Airey*.[1] In this case, the plaintiff was injured on February 24, 1951, in a motor collision alleged to have been caused by the negligence of the deceased who died in the same incident. On March 18, 1957, the defendant took out letters of administration to the estate of the deceased, and on September 9, 1957, the plaintiff issued the writ. The defendant pleaded that, six years having elapsed,[2] the claim was barred under section 2 of the Limitation Act, 1939. This issue was tried as a preliminary point of law.

It had generally been thought that the limitation period prescribed by section 1 (3) (*b*) of the 1934 Act was complementary to the general six-year period, so that an action in tort against the estate of a deceased person, not pending at the date of death, would be barred either six years from the accrual of the right of action or six months from the grant of representation, whichever time first expired. Indeed, it was implicit in the 1934 legislation that any defences which would have been available to the deceased had he survived would be available to his personal representatives. However, the court rejected this view, holding that " prima facie if it is enacted that a particular kind of action is only to be maintainable if brought within a specified time, that means that it is, so far as time is concerned, to be maintainable if it is brought within that specified time." Thus the general limitation period, then prescribed by the Limitation Act, 1623, was excluded by section 1 (3) (*b*) of the Act of 1934. The Limitation Act, 1939, however, repealed the Act of 1623, and in section 2 renewed the general six-year period for all actions in tort. The court thought that this might have changed the law *sub silentio* to include actions brought under the Act of 1934 were it not for the saving provision in section 32 of the 1939 Act. This provides that:

[1] [1958] 2 All E.R. 571; also reported [1958] 1 W.L.R. 729.

[2] In respect of causes of action for personal injuries accruing since June 4, 1954, the period is now three years. Law Reform (Limitation of Actions, etc.) Act, 1954.

> "This Act shall not apply to any action or arbitration for which a period of limitation is prescribed by any other enactment . . ."

It was held that section 1 (3) (*b*) of the 1934 Act was such "other enactment," and that accordingly the general six-year period was not applicable. In the result, therefore, the court decided that where proceedings were not pending at the date of death then the only limitation period applicable to actions in tort against personal representatives is the period of six months from the grant of representation. Accordingly the action could proceed, notwithstanding that it would have been statute barred against the deceased had he survived.

The court expressly left open the question of whether the position is changed in any way by the Law Reform (Limitation of Actions, etc.) Act, 1954. Section 4 of this Act amends section 1 (3) (*b*) of the 1934 Act by repealing the requirement that the cause of action must have arisen not earlier than six months before death. Thus the consequences of applying the decision of *Airey* v. *Airey* to the new situation would be quite fantastic. This was recognised by Diplock J. when, taking the view that it would apply, he said at first instance,[3] "It would seem, therefore, that today, although so long as the tortfeasor lives no action can be brought against him for damages for personal injuries after three years have passed since the cause of action arose, the moment he dies, however long after the cause of action arose, an action can be brought for the tort against his personal representative, since the only limitation period for such an action is six months after the appointment of his personal representative." However, this assumption that the decision would apply to causes of action accruing since the 1954 Act is *obiter dictum*, and was disclaimed in express terms by the Court of Appeal. Thus the present position is free from binding authority, and the question may still be approached *de novo*. It may, therefore, not be too irrelevant to suggest such an approach.

It is significant that all the periods of limitation prescribed by the 1939 Act have one quality in common, *viz.*, they are *periods fixed in the first instance by reference to the date of the accrual of a right of action.* Surely therefore this must be the type of period contemplated in section 32, and to which the words "period of limitation" there refer.[4] The period prescribed by section 1 (3) (*b*)

[3] [1958] 2 All E.R. 59, at p. 62 G.

[4] The wording of s. 22 is also instructive. Dealing with cases in which the plaintiff is under a disability when the cause of action accrued, it does not extend the "period of limitation," but provides that the action may be brought within six years of the cessation of the disability "notwithstanding that the period of limitation has expired." This is plainly consistent with an intention to limit the term "period of limitation" to periods fixed by reference to the date when the right of action accrued (or is deemed to have accrued) save only in the exceptional cases of fraud and mistake provided for by s. 26. In other words, s. 22 provides an example of a time limitation period which is not a "period of limitation."

Examples of periods which, on this view, are within the exclusion

of the 1934 Act might have been in this category so long as it was necessary for the right of action to have accrued within six months before death, but is certainly taken outside it upon the repeal of that provision. As it now stands, the period prescribed by section 1 (3) (*b*) of the 1934 Act is simply one designed to facilitate the expedient administration of the estate, and one fixed by reference to the beginning of that administration. Words mean nothing by themselves, and it is submitted that to include the special period prescribed by the 1934 Act (as amended) within the scope of the words " period of limitation " in section 32 of the 1939 Act, would be to extend the meaning of those words beyond the qualities attributed to them in the remainder of the statute. Such an extension might be justified to produce a result universally accepted as desirable, but certainly not to produce the anomalous consequences which would ensue in this case. Accordingly it is submitted that in respect of causes of action accruing since June 4, 1954,[5] the special limitation period prescribed by section 1 (3) (*b*) of the 1934 Act is complementary to the general periods of six and three years prescribed by section 2 of the 1939 Act (as amended). On this view such actions are statute barred either six years from the accrual of the right of action (three in cases of personal injuries) or six months from the grant of representation, whichever time first expires. This duplicity need cause no hardship by reason of delay in taking out representation, for if this is not done with due expedition then the person aggrieved can apply to the court for the appointment of his own nominee as administrator.[6]

Terence G. Ison.

Bill of Lading Clause Adapted to Charterparty

In *Adamastos Shipping Company* v. *Anglo-Saxon Petroleum Company* [1958] 2 W.L.R. 688; also reported [1958] 1 All E.R. 725 the owners had made every effort to engage a competent crew, but they failed. So the ship's engines frequently broke down, the ship was unseaworthy, and the charterers lost some £80,000, which they sought to recover from the owners. The Court of Appeal allowed the claim,[1] but the House of Lords, by a majority, rejected it, restoring in substance the judgment of Devlin J.

The case turned on the construction of the " paramount clause " —a bill of lading clause originally drafted to make non-Hague Rules documents conform with the Rules. This clause had been pinned

provisions of s. 32 are the periods prescribed in s. 13 of the Moneylenders Act, 1927, s. 8 of the Maritime Conventions Act, 1911, and in the Fatal Accidents Act, 1846 (until amended in 1954).

5 The date of the commencement of the 1954 Act.

6 *In the Estate of Simpson* [1936] P. 40.

1 Noted in (1957) 20 M.L.R. 513.

to the printed charterparty, and the owners successfully contended that since they had exercised due diligence to make the ship seaworthy, the loss due to unseaworthiness fell on the charterers. The Court of Appeal had held that the paramount clause was "insensible," but three of the learned Law Lords held that it made sense. Taking a broad view of the commercial purpose of the clause it was possible to apply it *mutatis mutandis* to a contract for which it was not designed.

In the Court of Appeal, Denning L.J. (as he then was) had described the intention of the parties as a "phantom guide," and had come to the conclusion that in this case, at any rate, owners and charterers had not considered the implications of the clause. The majority in the House of Lords, however, following the reasoning of the learned judge, and in one respect going even further, held that the clause made sense if properly construed, mainly for the following reasons.

The opening words of the typed clause—"this bill of lading"—were simply *falsa demonstratio*, which the court had power to correct. Moreover, it was well known to commercial lawyers that for some time there had been a tendency to convert the shipowner's absolute duty *vis-à-vis* the charterer to provide a seaworthy ship into a duty merely to exercise diligence to make the ship seaworthy, as was owed by the shipowner to the bill of lading holder. Bearing this in mind it was possible to disregard words in the paramount clause that made no sense in a charterparty and to conclude that, since admittedly the owners had exercised due diligence, they were not liable to the charterers for damage suffered as a result of unseaworthiness of the ship.

With respect, this line of reasoning may have far-reaching and unforeseen consequences. To rely on the tendency among businessmen to equate the shipowner's liability under charterparties and bills of lading in order to discover the alleged intention of the parties in a particular contract amounts in effect to going beyond what is expressed in the document and to let in extrinsic considerations of a practice that does not amount to a trade usage. Even a trade usage is normally relied upon only to interpret the meaning of a word in order to show that it has a meaning other than its natural one. In this case a far more nebulous practice is used to obliterate, as by a magic wand, all those words in the clause and in the foreign statute to which the clause refers which are inconvenient to the party responsible for the insertion of the clause.

Although all learned judges engaged in this case were full of contempt for the slovenly method adopted by the parties, yet the majority in the House of Lords imputed to these very same parties the clear intention of wishing to follow a not uncommon but by no means universal practice relating to similar contracts of this nature.

Viscount Simonds denied that this case involved a principle; the case, he said, was only concerned with interpreting a carelessly

drafted document. But it is respectfully submitted that the House did in fact establish a new principle, namely, that a clause which contains at least as much that is inapplicable as is applicable to the main purpose of the particular contract can be made to fit by referring to extrinsic evidence of a usual practice and that judicial notice can be taken of that practice.

That this principle is not easily applied is surely proved by this very case, in which five of the learned judges came down on one side and four on the other. It would appear that this is not proof of that clarity of language which is required to cut down the duty of a shipowner to provide a seaworthy ship—a point made in the minority speeches in the House of Lords.

O. C. GILES.

PATENT ERRORS OF LAW

IN December 1950 the Divisional Court of the Queen's Bench Division held, in the *Northumberland* case,[1] that certiorari would lie to quash a decision of a statutory tribunal for an error of law on the face of the record even if the error did not go to the tribunal's jurisdiction. At the time it was widely thought that this decision would lead to a fairly substantial increase in successful challenges to the determinations of administrative tribunals. Even the sceptics, however, must be surprised at the course that events have taken. There seem to have been only seven other reported cases in which decisions of statutory tribunals have been quashed by certiorari on this ground: two have been concerned with compensation appeal tribunals, two with agricultural land tribunals and three with medical appeal tribunals constituted under the National Insurance (Industrial Injuries) Acts. No doubt there have been several unreported cases, but it is unlikely that any massive iceberg lies beneath the surface. The Civil Judicial Statistics show that applications for leave to apply for orders of certiorari have actually declined from forty-one in 1950 to twenty-two in 1957, and one suspects that only a very few of these applications were in respect of errors of law on the face of the record.

Far from being inundated by applications, the courts have been kept short of business. This has not been due to an excess of caution on the part of courts in defining the limits of their supervisory jurisdiction. On the contrary, they have given a broad interpretation to the concept of the "record"[2]; they have rejected the contention that their jurisdiction is ousted by the presence of a finality clause[3]; they have detected manifest errors of law on the

[1] *R.* v. *Northumberland Compensation Appeal Tribunal, ex p. Shaw* [1951] 1 K.B. 711; affirmed [1952] 1 K.B. 338.

[2] As in *R.* v. *Medical Appeal Tribunal, ex p. Gilmore* [1957] 1 Q.B. 574, and in the *Baldwin and Francis* case to be considered in this note. *Cf. Davies* v. *Price* [1958] 1 W.L.R. 434.

[3] *Gilmore's* case (*supra*).

face of decisions that were not fully reasoned [4]; and they have treated as errors of law findings and inferences which they might have treated as errors of fact.[5] But they have shown no inclination to welcome the opportunity of reviewing the decisions of the Patents Appeal Tribunal by this method. This tribunal, which consists of a High Court judge, hears appeals from decisions of the Comptroller-General of Patents and his superintending examiners on a variety of highly technical matters, and no appeal lies from its decisions; nevertheless, it is an inferior tribunal for the purpose of subjection to review by certiorari. In the two cases in which the Divisional Court has been asked to quash the decisions (or judgments) of the tribunal for error of law on the face of the record, the court has obviously been embarrassed by its responsibility. In the first of these cases [6] the court adopted the not unfamiliar technique of characterising the alleged error as one relating to a question of degree and therefore of fact, and accordingly dismissed the application. In the second case, *Re Baldwin and Francis' Application*,[7] the main contention put to the court was that the tribunal had misconstrued a provision of the Patents Act, 1949, whereby the Comptroller-General of Patents could direct a reference to another patent to be inserted in a specification if it appeared to him that an invention could not be performed without a " substantial risk " of infringing the other patent. The court held that the question whether such a " substantial risk " existed in any particular case was one of fact, and rejected the contention. On appeal, this contention was abandoned, but it was further contended that the tribunal had erred in law by misconstruing one or both of the rival specifications of patents around which the case had turned. The Court of Appeal held (*R.* v. *Patents Appeal Tribunal, ex p. Baldwin & Francis Ltd.*[8]) (i) that both specifications formed part of the record of the tribunal, the one because extracts from it were set out in the tribunal's decision [9] and the other because it was the document initiating the proceedings [10]; (ii) that an erroneous construction of the specifications might constitute an error of law; but (iii) that since the documents were expressed in technical language on the meaning of which the court would have to be informed by extrinsic evidence which was, however, inadmissible because the

[4] As in the *Northumberland* case itself and *Gilmore's* case. See also *R.* v. *Birmingham Compensation Appeal Tribunal, ex p. Road Haulage Executive* [1952] 2 All E.R. 100 n. (absence of evidence in support of a material fact in a determination purporting to set out the evidence).

[5] As in the later " paired organ " cases: *R.* v. *Medical Appeal Tribunal at London, ex p. Burpitt* [1957] 2 Q.B. 584; *R.* v. *Medical Appeal Tribunal for South Wales District, ex p. Griffiths* [1958] 1 W.L.R. 517.

[6] *R.* v. *Appeal Tribunal, ex p. The Champion Paper & Fibre Co.* [1956] R.P.C. 323.

[7] [1957] R.P.C. 465.

[8] [1958] 2 W.L.R. 1010.

[9] See also *Gilmore's* case (*supra*).

[10] Applying dictum of Denning L.J. in the *Northumberland Case* [1952] 1 K.B. at 352.

alleged error did not go to jurisdiction, the court could not construe the documents and the appeal had to be dismissed.

The *Baldwin and Francis* case suggests that as a means of reviewing decisions of the Patents Appeal Tribunal certiorari for error of law on the face of the record is almost useless. In some other contexts it has proved to be useful, and with the coming into force of the Tribunals and Inquiries Act, 1958 (which imposes upon a number of statutory tribunals, and also upon Ministers in respect of statutory inquiries held by them or on their behalf, the duty to give reasons for their decisions, and which also nullifies the effect of formulae appearing in a few statutes excluding the supervisory jurisdiction of the courts [11]), it is likely to be employed more extensively. It cannot be assumed, however, that judicial review exercisable by this method and on these grounds will be equally appropriate for all classes of determinations; and where judicial self-restraint is thought to be the most suitable course to follow, reference to the approaches adopted by the courts in the Patents Appeal Tribunal cases may be instructive.

S. A. de Smith.

[11] ss. 11, 12. S. 12 (3) of the Act enlarges the concept of the record by providing that *any* statement of the reasons given by the authorities referred to in the section after the appointed day shall be taken to be part of the record. This formulation covers an oral statement of reasons.

REVIEWS

Legal Thinking Revised: My Views on Law. By A. Vilhelm Lundstedt, Emeritus Professor of Civil and Roman Law, former member of the Swedish Riksdag. [Stockholm: Almquist & Wiksell. 1956. 406 and (Bibliography and Table of Contents) 14 pp. Sw. kr. 19.00.]

Anders Vilhelm Lundstedt, who died in 1955, had been a member of the Swedish Riksdag, Professor of the University of Uppsala, an active teacher and a prolific writer. He meant the present volume to be the conclusion of his life's achievement, an outline of his views on fundamental questions of law and society. "I hold these views of mine . . . ," he wrote, "to be nothing short of a basic reshaping of legal thinking." The work, in proof at the time of his death, has now been published by the Faculty of Law of his University under the editorial guidance of Professor Per Olof Ekelöf. Its four parts are entitled: General Criticism of Prevailing Jurisprudence; Jurisprudence as a Science; Are Declarations or Statements of Written or Unwritten Law to be Characterised as Rules of Law?; Viewpoints on Anglo-American Jurisprudence.

Lundstedt was perhaps the most extreme of the writers inspired by Axel Hägerström who to us are known as "the Scandinavian Realists." His "realism" involves a rejection of all "metaphysic," a refusal to admit the reality of anything but "facts," and a refusal to admit the validity of any method of thinking different from that of the scientist. He denies, repeatedly and vehemently, that there is any objective reality corresponding to the "false notions" of right, duty, obligation, guilt, liability, etc. (*cf.* p. 16 of the present volume); the only reality he will allow them is psychological, as feelings in our minds. He denies that value-judgments have any meaning, and therefore he denies that normative language (using such words as "ought," "should," "must") has any meaning, save in the empiric sense, *e.g.*, "You must leave now, if you want to catch your train"). He denies, of course, that law is imperative. "'Law,'" he writes on p. 8, is "nothing but the very life of mankind in organised groups and the conditions which make possible the peaceful co-existence of masses of individuals in social groups and their co-operation for other ends than mere existence and propagation . . . 'law' is an intricate machinery which is essentially kept going . . . by means of psychological impulses arising in various ways from the nature of man, his senses, his instincts, and his emotions."

Grotius or Pufendorf might almost have written these words. They too knew something of these "psychological impulses" coming from the *appetitus societatis*. But the old natural lawyers (so far as they founded themselves on observed nature and not on supernatural revelation) made a logically illegitimate transition from *Sein* to *Sollen*, proceeding from the observation that man has certain impulses and does certain things to the conclusion that man *ought* to follow these impulses and do these things. So did such opponents of traditional natural law as the Utilitarians, when from the observation that men seek pleasure they concluded that men *ought* to seek pleasure, and Duguit, when from the observation that men live in society he inferred a *duty* to promote social solidarity. Kelsen saw more clearly when in his early writings he offered an account of law stated purely in terms of *Sollen*. Lundstedt saw more clearly and tried to present an account purely in terms of *Sein*. This is what he meant by a philosophic or scientific account.

Did he succeed? The present reviewer some years ago, when commenting

on the work of Lundstedt's teacher Hägerström, confessed his own inability to see how any practical science can be conducted on the sole basis of the empiric knowledge that a leads to x and b leads to y; surely we must choose whether to aim at x or at y; we must make the value-judgment that one of these is better than the other. Lundstedt struggled to avoid this conclusion. In his jurisprudential writing he often refers (as he did in his practical work as legislator and publicist) to "social welfare" as the end of law. He explains on p. 140 of the present work that this does not import any value-judgment but simply the factual constatation that the overwhelming majority of human beings "wish to live and develop their lives' possibilities"; there is, then, "nothing else to be determined for the developing of legal machinery than the consideration of what is required in order that the actual aspirations of men just indicated may be realised to the most practicable extent." To the present reviewer this seems to beg a dozen questions. Why, in the first place, *should* men's aspirations be realised? Why should their possibilities be developed? What is meant by "develop"? Are all possibilities equally worth developing? Suppose I have—suppose many men have—an aspiration to make money and a latent talent for making it by false pretences, is this a possibility to be developed? Who is to decide? Apparently not the individual concerned but the legislator. Then what are we to say about the tyrannical dictator? Is "social welfare" just whatever the dictator chooses to impose upon his people? Lundstedt does attempt to meet the case of the dictator by pointing out that the dictator at least *pretends* to his people that he has their welfare at heart and that in fact the dictator must maintain the minimum essentials of social economic life and must maintain a certain feeling of security; but he is obviously not well content with his answer and admits (p. 148) that dictatorial reigns of terror have "very little to do with the legal order in the ordinary meaning of Western civilisation" and (p. 146) that his own presentation of social welfare "as a guiding motive for legal activities as well as legal science" is in effect "limited to the consideration of a country such as Sweden."

If this were all, Lundstedt would have no great claim to be considered a philosophical thinker. But in other passages—he is so rambling and verbose a writer that it is difficult to grasp all the inter-connections of his thought—we get indications of an answer which, in some ways, is more acceptable. "Science in the philosophical, *i.e.*, epistemological, sense is one thing, while science as practised in society is another" and the latter "can be evaluating as well" (p. 268). In other words, the *philosophy* or *science* of law is limited to observation of how law works towards an end, without judging whether the end is good or bad, but in "constructive" jurisprudence, that is, in *practice*, the legislator, the courts, the public and the writer on jurisprudence (including, as he admits, Lundstedt himself) may and indeed must introduce their own notions of what is good and what is bad.

To the reviewer the following comments suggest themselves: (1) In the *philosophy* or *science* of law "social welfare" would seem thus to be emptied of content and reduced to a purely formal term. (2) In "constructive," evaluating jurisprudence, if a notion of "social welfare" is to serve "as a *practical* guide," we need what Lundstedt does not give us, namely, a systematic social ethic, otherwise "social welfare" will become just another of these meaningless magical incantatory terms which Lundstedt is so anxious to banish from our thinking. (3) The practical employment of legal machinery surely involves the use of concepts and rules; is the study of these not part of Jurisprudence?

Lundstedt's answer to the last of these questions would appear to be a grudging and qualified affirmative. His discussion of "rules of law" is not easy to understand, particularly for one who is imperfectly acquainted with the implications of the Swedish term *rättssats* (equivalent to the German *Rechtssatz*) and has not kept up to date with recent argument on the relation between *Rechtsnorm* and *Rechtssatz*. It seems, however, that Lundstedt is

not a "rule-skeptic" in the sense of Judge Frank. Lundstedt's thesis is that the "rules of law" applicable to the activity of judging should, scientifically, be regarded as analogous to the "rules" applicable to any other activity, that is, as descriptive factual statements and not as imperatives with an inherent binding force of their own.

Athough we have some doubt whether metaphysic does not slip in somewhere at the apex of Lundstedt's system, we can admire the ruthless gusto with which he expels it at all lower levels. He triumphantly shows up the notorious weaknesses in the notion of "the will" as a source of binding obligation, be it "the will of the State" or the will of the individual party to a contract. He accuses the "reliance" theory of contract of putting the cart before the horse; in his view it is the fact that promises are legally enforced that disposes us to rely on them. In discussing tort and crime he is contemptuous of all attempts to find in such concepts as "negligence," "guilt," "wrongfulness" an explanation why certain acts should incur legal sanctions. We might say that for him there are no *mala in se* but only *mala* which are *prohibita* in the interest of social welfare. "The regular punishment of certain actions, *i.e.*, the so-called crimes, [is] a condition necessary for the society's existence and peaceful development" (p. 221). He goes beyond the idea of deterrence; for him the social function of criminal law consists in the fostering of a general, spontaneous, instinctive feeling against the acts which are prohibited. He scoffs at reformative theories of punishment. "The interest of society in having crimes punished is a fact that *overshadows everything else*" (Lundstedt's italics) (p. 239).

There are further consequences of this impassioned concentration on society as the end. Lundstedt attacks both Utilitarianism and *Interessenjurisprudenz* because the adherents of these schools admit the legitimacy of private interests which may have to be balanced against public interests. Logically, too, he attacks the notion of Justice (pp. 269–300) for attributing to the individual a *jus suum*. It is "simply not understandable because it is a contradiction" to assert that the law fulfils a social function if one at the same time allows that the individual can have any rights "as an object or end in himself and not as an element in the community" (p. 284).

We recall Mussolini's: "For the Fascist nothing human or spiritual exists, still less has value, outside of the State." Lundstedt appears to have been in practical matters an intelligent, humane and tolerant man, but his writings could easily be pressed into the service of totalitarianism.

Lundstedt's writing shows other faults of temperament and style. He is often egotistic and arrogant, *e.g.*, (p. 7): "In 1934 I was impudently attacked in a paper by two brash youngsters . . . I did not feel that these two cocky boys rated an answer." He is, as he himself admits (p. 21), repetitive; he is also tediously and clumsily voluble and the looseness of his writing fills his text with apparent contradictions. Like many of his countrymen he had a remarkable knowledge of the English language, but he did not know it well enough to write a book in English and on every page we are irritated by some word or phrase which is unidiomatic, incomprehensible or just plain wrong. He uses "also" for "even," and "shall" (in one sense of the German *sollen*) for "is supposed to," *e.g.*, on p. 59 "the negligence which the blame in this case shall involve." We offer to the publishers the following beginning for a list of *corrigenda*: p. 5 "paramount to" (should be "of supreme importance for"); p. 11 "Mephistopheleanly" and "Faustianly" are not common English adverbs; p. 11 "about to be compared" (? "worthy to be compared"); p. 23 "believed in having found" ("believed themselves to have found"); p. 25 "to find this origin immediately in natural justice would be formally too dim" (? ? ?); p. 26 "equity law" ("equity"); p. 27 "to speak as silently as possible of it" (? "not to admit this"); p. 36 "mean something with a legal duty" (? "mean something by the term 'legal duty'"); p. 41 "punished or caused to pay damages owing to" (" . . . on account of"); p. 47 "The exclusion of allowing value judgments to enter

. . . is obvious" ("It is obvious that value judgments cannot be allowed to enter"); p. 51 "initiated in the case" (? "taking part in the case"); p. 51 "answered in the positive" ("answered in the affirmative"). These are by no means all the *corrigenda* in the first 50 pages and the proportion is well maintained in the remaining 350 pages. Here is a longer specimen of semi-comprehensibility from p. 100: "Another example is the non-preventing liability for damages through certain so-called dangerous activity. In order further to illustrate this matter I must take exception from staying entirely with chattels. I can then mention liability for nuisances."

Lundstedt confesses (p. 21) that "English is for me a foreign language, and my American assistant in the translation may have felt himself hamstrung more than once by my insistence on greater precision." We suggest that books in English should be written (or translated or revised) by someone who can write English and not by the joint efforts of a Swede and a hamstrung American.

A. H. Campbell.

Protection from Power under English Law. By Lord MacDermott (Lord Chief Justice of Northern Ireland) being the Hamlyn Lectures for 1957. pp. viii and 196. [London: Stevens & Sons, Ltd. 1957. 16s. 6d. net.]

The Hamlyn Lectures continue to depart pretty widely from the objectives set by the founder when she established her trust which was to keep the "Common People of the United Kingdom" informed of the superiority of British jurisprudence over that prevailing among other European nations. From the beginning these lectures have been addressed to the highly educated, if not indeed to the legal profession. And the present series is no different in this respect from those delivered in the past: indeed if anything in the compactness of its thought and the close development of its argument it is even less suitable for "the man on the Clapham omnibus" than several of its predecessors.

It is perhaps foolish to regret that the terms of Miss Hamlyn's trust should have been disregarded in this way because these lectures have on the whole made a distinctive contribution to British legal thinking, and the series of volumes in which they have achieved publicity form an addition to our law libraries of a character and value which they could hardly have possessed if the donor's objective had been carried out. This has been particularly the case when distinguished judges have been chosen as lecturers, and the profession is indeed fortunate that such eminent practising lawyers as Lords Denning and MacDermott and Sir Patrick Devlin should have been prepared to take part in the enterprise.

In the present series Lord MacDermott has chosen for his subject much the same field as that covered by Lord Denning in his remarkable opening course on Freedom under the Law. He has, however, tackled it rather unexpectedly, from the reverse angle, that of an analysis of the main enemy which confronts freedom in any community, power and its abuse. This is undoubtedly a very valuable line of approach to what is probably in terms of present-day politics the most important, and certainly the most burning, of all topics. Lord MacDermott's lectures should be read with those of Lord Denning, for taken together they provide a wise and liberal commentary on the fundamental problems of liberty, given of course primarily from a legal point of view.

In no part of the British Commonwealth of Nations has the question of maintaining freedom in the face of an exceptionally formidable build-up of power been so acute and difficult as in Northern Ireland, in which Lord MacDermott has spent most of his working life. Moreover that life was not only the life of a working lawyer, but that of a politician and statesman, a

member of a governmental hierarchy faced with but negligible opposition in Parliament, but with real, substantial and continuous opposition among a substantial minority of the community over which it is called upon to rule. Lord MacDermott cannot but have been very conscious throughout his career as a public man of the reality of the problem on which he decided to lecture, and never more conscious of it perhaps than when he took up his stand on the rostrum at the Queen's University in Belfast to open his discourse.

But Lord MacDermott was also at one period a lecturer in law at that very university, and this (or was it his native temperament?) has given him the ability to stand aside and view his problem in a detached and scientific manner which it is perhaps a little surprising to find in a Northern Irishman so circumstanced. Moreover he brings to the discussion a liberality and moderation which is a good augury for the eventual solution of the Irish problem, and which it is particularly encouraging to find in one who has played his part for some years in wielding a governmental power which has as a matter of practical politics been almost unfettered, however sensibly, and even generously, it may on the whole have been exercised.

There can be no doubt that a great part of the value of this series of lectures derives from the fact that Lord MacDermott has enjoyed the wide political experience to which I have just referred. A shrewd foreign historian once said to me that the distinctive quality which so many of the more eminent English historians brought to their work was an acute sense of the realities of political and social affairs in which so many of them, in contradistinction to their foreign opposite numbers, had played a practical part. The same observation is generally true of our judiciary, and particularly so on an occasion such as the present one when we are concerned with a topic in which the legal element is only one, and not always the largest, part.

In his short introduction Lord MacDermott singles out what he regards as the three most fundamental attributes which should characterise a system of law, discipline (public order), equality ("the rule of law") and morality (fairness, justice and goodness). It is by means of these touchstones that he has taken "soundings at a number of different points . . . in the vital regions of Protection from Power."

The most obvious way of settling with an inconvenient opponent if you have supreme power is to arrest him and cut off his head, or at any rate keep him shut up. The problem of preventing this is elementary and crucial and is naturally elaborately discussed in the textbooks. Lord MacDermott's approach to it is unusual and interesting: he discusses it in the light of the power of prosecution and how this is controlled in practice. The essential factor here is the Attorney-General, who has authority over all prosecutions through the *nolle prosequi*. The history of the Attorney-General's office is fascinating and has not been much investigated, although Professor Keeton has an interesting chapter on the subject in his life of Lord Robson. Lord MacDermott, who held the position in Northern Ireland for some years, brings out its essential importance in the borderland between law and politics, and underlines the wisdom and restraint with which successive Attorneys have wielded their power.

Lord MacDermott's handling of his next topic "the power of Parliament" proceeds on orthodox lines which it is not necessary to elaborate. He makes, however, a number of shrewd comments. Thus he suggests that the very fact that Parliament's legislative power is so unfettered tends "to keep it sensitive to public opinion." Again he emphasises that much of the "modern power-giving legislation" has "a special tendency to work to the prejudice of the subject." Yet the objectives are generally accepted. In these circumstances the "tendency" mentioned "may have to be accepted if the purpose of the legislation is to be attained." It then becomes unfair of the public to make the bureaucracy who have to administer the legislation its "favourite target of attack," for the "criticisms advanced" in fact "relate to powers and duties that Parliament has created, or to conduct that it has sanctioned."

Lord MacDermott then picks out for special discussion four groups of enactments which are particularly dangerous from the point of view of misuse of power. Three of these are concerned with delegations of authority and are of the kind which have been much discussed from, and indeed before, the time of Lord Hewart onwards. In respect of this matter he makes the important point that the psychological effect of the abuse of power in the resentment, misunderstanding and sense of injustice to which it gives rise, may be as damaging to the body politic as the abuse itself. He might have added that these feelings can be, and are, worked up by unscrupulous opponents of the policies embodied in the legislation in question when no abuses have in fact occurred.

Lord MacDermott's fourth head is that of "enactments which result in burdens and injustices that Parliament has not intended," what he calls the "chapter of accidents." Most of the examples which he gives are injustices to property owners such as the failure to provide compensation for loss of goodwill in the requisition of land or buildings, an omission in respect of which he very properly uses strong adjectives such as "harsh" or "unfair." These matters usually only affect minorities, often very small minorities, but the consideration with which such groups are treated in respect of accrued legal rights is a touchstone of fairness and morality in politics.

Lord MacDermott admits that there is no obvious or satisfactory solution of this problem. He examines and discusses the suggestions which have been made from time to time, such as better drafting of the legislation with which he is concerned. In respect of this he makes the interesting proposal that the text of new measures should be tried out before publication "on a small panel kept for the purpose whose essential qualification would be intellectual competence." But by and large he comes to the conclusion that eternal vigilance and continuous public criticism are the best safeguards, and to this end he particularly advocates periodical reports to a Parliamentary Committee set up for the purpose by the Departments which have the duty of administering the statutes in question.

And in regard to the administration of delegated legislation Lord MacDermott gives "pride of place" as a safeguard to the maxim "*audi alterem partem*," of the importance of which he thinks that the legislature is becoming increasingly aware. He goes on to point out that "in Austria it pervades practically the whole field of administrative procedure": how different from us, O shade of Miss Hamlyn !

Finally on this part of his subject Lord MacDermott does face a problem, if not altogether successfully, of which the Franks Committee seem to have been unaware when they made their recommendations for bringing many of these administrative and quasi-administrative decisions within the ambit of the ordinary courts of law; that is the possible conflict between the judiciary and the legislature. The administration of the statute with which we are concerned in dealing with the problem is entrusted to Ministers who are answerable to Parliament at present. The proposal is to make them answerable to the High Court, and the question is how far this is wise. Lord MacDermott does not regard it as a very practical proposition, at any rate in more than a limited category of cases. Nor does he think it feasible to set up an administrative tribunal like the French Conseil d'État. He does, however, suggest that an advisory body of "distinguished administrators and experienced lawyers" should be set up "to which an executive department could at the discretion of its Minister refer an administrative problem involving the rights, welfare, or livelihood of the subject." From this eventually an institution somewhat on the lines of the Conseil d'État might evolve.

The Power of the Executive is no doubt the aspect of the problem which looms most largely before the nation at the present time. Lord MacDermott's chapter on this subject is, however, somewhat disappointing. In the first place a good deal of what he has to say about it is, as will already have

been evident, contained in his chapter on the Power of Parliament. Here he concerns himself largely with judicial control of the executive by means of the prerogative writs and with some of the proposals of the Franks Committee for procedural reform. Curiously enough parliamentary control is not more than touched upon, though some observers think that improvements here may well prove more effective than bringing in the courts, which of their very nature must be less understanding of many of the problems involved than experienced politicians. Lord MacDermott hopes that the Administrative Council which he suggested in his earlier chapter may prove the best safeguard, if it ever gets itself established—but even so he envisages it as eventually settling down as a division of the High Court. Certainly such a Council could within a strictly delimited sphere perform a most useful function. But, as Lord MacDermott himself suggests, the problem here is in its widest context basically one of establishing a balance and this "demands a process of patient and perpetual adjustment." This it may be suggested falls rather within the art of the politician to attain than within the technique of the lawyer. Our author himself appears to realise that this is so, for his final word on this subject is to stress that the "balance" which he calls for is one which "the art of democratic government must go on achieving if it is to survive."

The other aspect of this matter which Lord MacDermott discusses is the negative one of Crown Immunities and Privileges in connection with legal proceedings, particularly in tort. He comes down strongly on the side of those who feel that the Act of 1947 did not go far enough, pointing out that that statute has not only worked smoothly but has not produced those "serious embarrassments to the executive," the gloomy prognostications as to which had held up reform for generations.

In his later chapters, which deal with the power wielded by non-governmental institutions in the community, Lord MacDermott finds himself in a region where as he himself says there is "a change of atmosphere and emphasis." He divides his subject-matter up into three divisions: (a) wealth and status; (b) monopoly and restrictive association; (c) numbers. This classification provides him with headings for three chapters, but it is not altogether satisfactory. For example it is the "wealth" which can be brought together by organising the savings of large "numbers" which produces the power of the limited liability company with which the first of these three chapters is partly concerned. Moreover, it is this same wealth which gets hold of the monopolies and establishes the restrictive associations which are the subject-matter of the second. But Lord MacDermott very pertinently points out that the proliferation since the war of great public service corporations which are largely financed by government money raises new possibilities of misuse of power which it is as yet impossible to assess. An aspect of this matter which he discusses is the advantage which wealth gives in the conduct of litigation, and in connection with this he considers the provisions which now exist for legal assistance. He also lends his support to the plea made by the late Lord Cooper in his address to the Society of Public Teachers of Law in 1953 for a simplified, less highly geared form of procedure, by means of which a great deal of cost could be saved and the privileges of the wealthy litigant be somewhat reduced.

Much of the discussion in these later chapters is taken up with the power of the trade unions, now an only too obvious source of injustice, and of course still growing. Although Lord MacDermott considers this problem in much more moderate terms than those used by some of his predecessors, stressing the unfortunate history of oppression which led to the privileged position now enjoyed by the unions, he does not conceal his view that here is one of the principal existing sources of uncontrolled power in the present-day State. And he is able to find in recent volumes of the reports a good deal of evidence that it has been abused. What he hardly brings out is that there

is little reason to suppose that such instances are more than sporadic in a very large movement.

Lord MacDermott propounds a number of possible checks upon the abuse of trade union power, emphasising that he is only concerned with their practicality from the legal point of view, and indicating that they may not be feasible politically. In this latter point he is no doubt quite right, because the prohibition of one kind of strike, the penalisation of another, and the abolition of immunity in tort, which are among these proposals, are certainly not practical politics at present and the mere advocacy of them by a judicial member of the House of Lords might have unfortunate repercussions.

The problem of monopoly is particularly difficult to handle in terms of a lay audience, and Lord MacDermott, who does not shirk the difficulties raised by the Acts of 1948 and 1956, is certainly to be congratulated on the lucidity of his exposition. He remarks, however, pertinently and perhaps a little ruefully, that "our happiness, our pockets and even our lives seem to be affected increasingly by issues which are swathed in technicalities," an observation which will be realised by everybody who has had occasion to study the subject, or who has tried to follow the arguments about inflation to which we have been treated by economists and politicians during recent months. He has, however, a number of shrewd observations to offer which should be pondered by those in control of these matters at the Board of Trade. Thus he contrasts the powers which have been conferred by the legislature of the U.S.A. on the "appropriate authorities in that country" for "breaking up or reducing these commercial kingdoms" with the rather anaemic "curbs" provided by the United Kingdom legislation. And he suggests that if in fact these new weapons against restrictive practices are found too irksome by the industrial associations at which they are aimed the result will only be to extend the area of unified control by the amalgamation of businesses.

Lord MacDermott in the time at his disposal obviously could not hope to cover all the areas within our community where power complexes exist and may give rise to abuse. Thus the religious bodies are far from having abdicated the claims which they formerly made, no doubt more effectively; the power of the local authorities would be well worth some discussion within the area of governmental activities; then there are organisations like the B.B.C. which use psychological power effectively and not always fairly. Nevertheless he has covered the areas which are specially dangerous at the present time and done so in a way which is both thought-provoking and illuminating.

C.

THE INTERNATIONAL COURT OF JUSTICE. By SHABTAI ROSENNE. [Leyden: A. W. Sijthoff. 1957. pp. xxvi and 592. 90s.]

MR. ROSENNE is the Legal Adviser to the Israeli Foreign Office and his *International Court of Justice* does for that Court what Judge Hudson did for its predecessor. Here is to be found a detailed analysis of the mechanics of the Court and, of equal interest, of the Security Council and the General Assembly which are responsible for the election of the judges. It is somewhat surprising to learn that the calendar for elections is so rigid that in 1954, when Judge Zafrulla Khan was elected, the elections had to take place on the Day of Atonement in Israel's absence, despite the fact that in the Assembly the successful candidate required an absolute majority of those entitled to vote, and not merely those present and voting. There is some evidence to suggest that Israel's absence was decisive (p. 136).

Apart from its detailed study of the formal working of the Court, Mr. Rosenne has provided "An Essay in Political and Legal Theory" and it is in the early part of his work, the Introduction and Part One on "The Court

as Part of the Machinery of Diplomacy," that much of its value is to be found.

It is commonly said that in international law a tribunal is unable to exercise its authority over "political" as distinct from "legal" disputes, the former being described as "non-justiciable." Mr. Rosenne, however, points out that litigation is but a phase in the unfolding of a political drama, and that international adjudication is a political operation that does not cease to have political consequences when the States concerned agree to have recourse to the Court. From this point of view, every dispute is a political dispute, and since States are political organs all their actions are politically motivated, including their attitude to the Court. It is for this reason that the Court has no initiative and "can only function in relation to the initiative of States, and has no greater capacity to operate than States are prepared to accord it. Within this formula the Court has great power—indeed greater than that of any other organ of the United Nations, the Security Council included. This is due above all to the fact that its decisions, reached by a simple majority of the judges taking part in a case, are binding" (p. 14). It is true that the decisions of the Court are binding. The same is true of the "decisions" of the Security Council. In accordance with the Charter, however, if a decision of the Court is disregarded, the defaulting State can only be brought to compliance upon the decision of the Security Council. If a decision of the Council is disregarded, the Council alone has authority in deciding upon the action to be taken.

While it is true that "in general it cannot be doubted that the mutual relations of the principal organs ought to be based upon a general theory of co-operation between them in the pursuit of the joint aims of the [United Nations] Organisation" (p. 42), it is a little difficult to follow Mr. Rosenne's contention that the power of the Security Council under Article 94 of the Charter is limited so as to prevent the Council destroying *res judicata* and overturning Article 60 of the Court's Statute on the finality of a judgment and Article 59 on its binding force (p. 105). Mr. Rosenne believes that the function of the Council is limited to giving effect to judgments, but it is submitted that this is to minimise the significance of the words, in Article 94, "may if it deems necessary." The learned author states that "it can be presumed, without much risk of error, that the Security Council is unlikely to set about wilfully destroying the authority of the Court—which can probably always be prevented by application of the veto; and in an exceptional case the Security Council might even be able to prevent any politically undesirable consequences from the Court's decision" (p. 108). It is surely inherent in this statement that the Council can, in order to "prevent any politically undesirable consequences from the Court's decision" and as a result of the "application of the veto," overturn any judgment it deems politically inept.

At a time when the establishment of the United Nations Emergency Force has led to a revival of proposals for the establishment of an international police force, it is useful to be reminded that, although non-compliance with a judgment is undoubtedly a breach of an international obligation, more harm than good is likely to be done by describing such non-compliance as an act of aggression (pp. 90–91). Moreover, in view of the complex legal-political nature of a case and of its judgment, to attempt to confuse the issue by references to an international police force is, politically, "likely to be worse than useless," for "the pressure of a strong and well-informed public opinion may be not less efficacious than the possibility of use of force in assuring the execution of judgments" (p. 115).

Mr. Rosenne, as is perhaps to be expected, is very impressed by the opinion of the Court on *Reparation for Injuries Suffered in the Service of the United Nations* (the *Bernadotte* case) and his comments on the relation between the

International Court of Justice and the Permanent Court of International Justice are of great interest. It goes somewhat far, however, particularly in the light of Article 59 of the Statute, to suggest that "following the reasoning of the Court in the *Reparation* case, it is arguable that fifty States, representing the vast majority of the members of the international community, have the power, in conformity with international law, to provide for the full devolution of jurisdiction from one World Court to its successor, in such a way that the devolution would operate objectively, and not subjectively" (p. 281).

One of the most important issues in connection with the practice of the present Court relates to its jurisdiction. At times it almost appears that the Court is unwilling to exercise jurisdiction even when it might. This situation arises from the plethora of reservations that have been attached by States to the declarations they have made under the "Optional Clause" of the Court's Statute. Among these reservations, perhaps the most important is that relating to issues which are essentially within the domestic jurisdiction of the State making the declaration, as determined by that State itself. Mr. Rosenne does not specifically discuss the significance of these reservations in the section on reservations (pp. 310–315), nor in that on jurisdiction as to the jurisdiction (pp. 339 *et seq.*). In his view, "the jurisdiction of the Court to determine its own jurisdiction is relative, and not absolute," even though paragraph 6 of Article 36 states specifically that, "in the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court." For him, jurisdiction "exists only to the extent that the title of jurisdiction does not provide otherwise. This follows from the autonomy of the parties and the consensual basis of all jurisdiction. The general principle is strong enough to outweigh all presumptions to the contrary, however; and only a most explicit stipulation in the title of jurisdiction can cancel it" (pp. 341–42). Presumably, in the light of the practice of the Court, any such stipulation is sufficiently explicit.

According to its Statute, among the law-creating processes to be used by the Court are the general principles of law recognised by civilised nations. Too often there is a tendency to assume that what one's own State does must, of necessity, be such a general principle, while what one's State does not recognise cannot be so regarded. In view of this, it is of value to reiterate with Mr. Rosenne that practice "shows that the 'general principles of law recognised by civilised nations' are not so much generalisations reached by application of comparative law, . . . as particularisations of a common underlying sense of what is just in the circumstances. Having an independent existence, their validity as legal norms does not derive from the consent of the parties as such, provided they are norms which the Court considers civilised States ought to recognise" (p. 423).

It was recognised at an early date that the amount of paper issued by the United Nations would far outweigh that produced by its predecessor. This is far from being the case with the Court. Between 1919 and 1939 the Permanent Court of International Justice delivered thirty-one Judgments, of which fifteen related to the Peace Treaties, and twenty-seven Advisory Opinions, no less than twenty-one of which related to incidents connected with the War or the Treaties of Peace. The International Court of Justice, apart from the ineffective Opinion on the *Interpretation of the Peace Treaties* with Bulgaria, Hungary and Rumania, has had nothing to do with the post-1945 settlements, unless the unsuccessful attempt to secure a judgment on the *Albanian Monetary Gold* (of which Mr. Rosenne gives a most interesting description in all its phases, pp. 97–102) is counted as one. In the thirteen years of its existence the new Court has delivered only seventeen Judgments (including three on the Corfu Channel and three on Asylum in Latin America) and twelve Opinions, although a number of applications have been made by

States unilaterally, knowing full well that the Court would have no jurisdiction. Among such applications are those relating, for example, to the aerial incidents between the United States and the Soviet Union and claims to sovereignty in Antarctica between the United Kingdom and Chile. Of these, Mr. Rosenne states that "the very fact that, in 1954, such a [unilateral] procedure could be conceived is eloquent of the advance in the notion of international adjudication that has been achieved since 1922" (p. 296).

Perhaps the future success of international judicial institutions, like that of supranational organisation in general, lies in the reason given by Mr. Rosenne for the popularity, and success, of the Permanent Court of International Justice. "While certainty as to the result of projected litigation can never exist, a government's ability to calculate its chances of success is certainly an important factor enabling it to reach its political decision of whether to litigate or not (p. 141). . . . This was possible because of the relatively closeknit character of Europe some thirty years ago, one of the features of which was, despite differences of national temperament, a relatively common degree of understanding concerning the nature of law and of international law, and of the purposes it is designed to serve. Above all, the Court was predominantly European in composition and in spirit" (p. 68).

For those who have doubts of the importance of the judicial process in international law, Mr. Rosenne's *International Court of Justice*, with its constant reminder that the judicial process merely involves the solution of political issues by other means resorted to because of a political decision, should prove a veritable mine of information and enlightenment.

L. C. Green.

The Development of International Law by the International Court. By Sir Hersch Lauterpacht. [London: Stevens & Sons, Ltd. 1958. xix and 408 pp. £3 3s. net.]

A quarter of a century ago Dr. Lauterpacht, then a Lecturer in Public International Law at the London School of Economics and Political Science, gave a course of five lectures at Geneva, which were published under the title of *The Development of International Law by the Permanent Court of International Justice*. It was the object of the slim volume "to examine, in terms of some typical problems of the judicial function, the principal tendencies which have distinguished the work of the Court and which permit some forecast as to the temper in which it is likely to approach future cases" (Preface, p. vii). Now Sir Hersch, a Judge of the International Court of Justice, presents what he describes as a second and revised edition of the earlier book, but what in effect is a new, perhaps ten times enlarged, work. Its object is "to present an assessment of the work of the Court—the two Courts—in terms of the persistent problems of the judicial function in general and of international tribunals in particular" (Preface, p. xiii). The difference of definition not only reflects the great changes which have come over the learned author and his status, but also throws light upon the new work's peculiar character and fascinating interest.

What is common to both books is, in the first place, Sir Hersch's basic philosophy, his belief in the pacifying, the creative and the progressive function of international law and judicial settlement, a conviction which in the first edition permitted him to speak of the "personal fortitude" required of international judges, but which in the second leads him to the conclusion that "the deliberate process of revealing fully the manner" of the operation of the several trends and principles discussed in this book "is the only concession which an international tribunal may properly make to the susceptibilities and claims of sovereignty" (p. 400). A second common feature is to be found in the manner of approach and presentation which has invariably marked the

author's numerous writings and which, over the years, has acquired a rare degree of distinctiveness: his scholarly objectivity and detachment; his willingness to discover, acknowledge and respect achievements, however modest they may be; his corresponding anxiety to build constructively rather than to criticise, negate or destroy; his sense of responsibility towards ultimate values which transcend realities of a possibly temporary nature; his sympathetic understanding of the specific difficulties facing the Court and, accordingly, his readiness to explain and forgive. It is only a writer commanding such qualities who, so one is bound to reflect, may venture to undertake the delicate task of reviewing the work of the Court to which, at the time of writing, he belongs. Thirdly, the fundamental ideas underlying the two editions and their scheme of arrangement are unchanged. In the first edition the forty or so decisions of the Permanent Court of International Justice which had been reported by 1933 were analysed under five broad headings: the law behind the cases; judicial caution; judicial legislation; effectiveness of the law; the Court and State sovereignty. The second edition retains these headings for the purpose of analysing the decisions of both Courts rendered before 1955, when Sir Hersch's appointment became effective. The learned author is, of course, fully aware of the fact that almost every decision of the Court provides evidence of conflicting tendencies, that, accordingly, hardly a single decision illustrates conclusively as well as exclusively the idea, for instance, of judicial caution as opposed to that of judicial legislation and that perhaps it does not matter too much whether the one or the other label is attached to it. Hence, notwithstanding the wealth of care and ingenuity bestowed upon the subject, the book does not aim at more than "an analysis of the considerations and problems which, in the light of experience, have proved relevant to forming the Judgments and Opinions of the Court" (p. 397). The discharge of this task which is essentially of a jurisprudential nature is in itself a matter of considerable significance, for since the judicial process employed by an international tribunal is determined by peculiarly complex ideas and tendencies, their clarification is bound to contribute to the proper appreciation of the Court's work and to provide a measure of encouragement to those who have its future at heart.

Has this analysis, then, a hidden secondary meaning? The question indicates perhaps the most significant of the substantive differences between the first and the second edition. Superficial readers will approach the latter from a specific standpoint: in view of the great importance which now attaches to Sir Hersch's views on international law itself the search for their ascertainment will for many be the main reason for studying this book. However, the question, no doubt foremost in the author's mind, whether the Court has to the fullest possible extent used the opportunity of making its contribution to the development of international law is neither put nor answered. If anyone is inclined to answer in the negative, then Sir Hersch gives him a sympathetic and usually convincing explanation, even though it will not always please the impatient. He frequently raises hypothetical criticism in order immediately to destroy or at least to reduce its force (see, *e.g.*, pp. 145, 148, 150, 189, 192, 195, 286). It is only on occasions that he raises a carefully formulated doubt (see, *e.g.*, pp. 88, 337, 366, 369, 370), his purpose being to warn against any facile disregard of the Court's peculiar difficulties rather than to discuss points of substantive law. It would, therefore, be an injustice to, and a distortion of the intentions of, its distinguished author if this book were read for what it is not rather than for what it is and aims at and achieves. Even on this footing there is so much insight to be gathered from so stimulating and thoughtful a study in the field of international judicial practice that the observant reader's quest for instruction will be fully satisfied with such crumbs (*si venia licet verbo*) as are at present allowed to fall from the master's table.

F. A. MANN.

Some Comparative Aspects of Irish Law. By A. G. Donaldson, ll.b., ph.d. (Belfast), Barrister-at-Law. [U.S.A., Durham, N.C.: Duke University Press; London: Cambridge University Press. 1957. xii and 282 pp. £2 5s. net.]

In this work Dr. Donaldson has discussed various branches of Irish law in some detail and has compared them with analogous legislation and case-law in Commonwealth countries such as Australia, Canada and India, as well as those in England and the U.S.A. The emphasis remains on the Irish law—that is the law common to all Ireland down to 1922, and the two distinct but similar systems of law which have developed in the two parts of the island since partition. The two modern Irish legal systems have hitherto attracted little attention from comparative lawyers based on the United Kingdom, America or Australia, perhaps because these systems are not fundamentally different from their own: but this study should stimulate "foreign" interest in Irish law. Too little has been written about Irish law from within the island in the last thirty years, *inter alia* on account of the commercial impracticability of publishing works for internal consumption only. Dr. Donaldson has had the enterprise to overcome this difficulty by adopting the comparative method and all students and practitioners of Irish law have now cause to be grateful to him and to Duke University and the Carnegie Corporation.

The core of these essays is Irish public law. Chapter 2 is devoted to the constitutional history of the island as a whole down to 1920. Chapter 3 is mainly concerned with the relations of the new State—first called the Irish Free State (under the Treaty of 1921 and the Constitution of 1922), later named "Ireland" (under the Constitution of 1937) and now to be described as "The Republic of Ireland" (under an Act, No. 22 of 1948)—with the United Kingdom including Northern Ireland and with the relation of the new State to the Commonwealth. In addition the Irish contribution to international law and conflict of laws doctrine is considered. Chapter 4 deals at length with the many developments in the internal constitutional law of the southern and northern parts of the island, and in particular contains a full analysis of the constitution of Northern Ireland based on the Government of Ireland Act, 1920, and of the southern Constitutions of 1922 and 1937. Chapter 5 is devoted to a detailed survey of the development of Administrative Law in both countries. These four chapters are without doubt the best general survey of Irish public law that has been written to date. Besides handling the intricate legislation (supreme and delegated) with great skill and precision the author has summarised the succeeding interpretative case-law most succinctly. He has succeeded in correlating the law and the political background with a degree of detachment which is remarkable and admirable in one who lives so close to acute political controversy. Presumably the stern positivism which characterises the work, the absence of criticism of specific legislation and of particular decisions, is to be attributed to the author's desire to expound the positive law without evoking such political controversy. Besides these expositions of public law Dr. Donaldson has offered an introductory essay summarising the fragments on Irish legal history which have been written by a few modern historians and historically minded lawyers and a concluding essay on the development of one branch of Irish private law—the land law. A twelve-page bibliography will be welcomed by all who have occasion to work or browse in the fields of Irish law.

At page 27 the author rightly complains that the doctrine of precedent in Irish law has not been as fully examined as that in Scots or English law, but he overlooks the lecture on the subject delivered by an ex-member of the Irish High Court and Supreme Court, Judge Black, which is summarised and criticised in 69 L.Q.R. 25 *et seq*: see also 66 L.Q.R. 33 & 310. A surprising omission from the bibliography to the chapter on constitutional developments is

the series of articles on the Irish Constitution of 1937 contributed to *The Irish Monthly* by Donal Barrington in 1952–53, which contain the best analysis of that Constitution and the case-law elaborating it which had been published until the present work appeared. In the section on the Irish contribution to international law at page 105 there is mention of *Saorstat & Continental S.S. Co., Ltd.* v. *Morenas* [1945] Ir.R. 291 but the author does not take up the large question of law raised in that case—whether international law is incorporated by the Constitution into Irish municipal law and accordingly whether international law overrides a conflicting common law rule or local statute. In that case at page 298 O'Byrne J., *per curiam*, said that principle XY "has long been recognised as a principle of international law, and must now be accepted as a part of our municipal law by reason of Article 29, para. 3 of our Constitution"—a most far-reaching answer! At page 111 the author accurately states that English or Scottish judgments could be directly enforced in the Irish Free State by virtue of the Judgments Extension Act, 1868, which remained in force there: but he leaves the reader with the false impression that this is still possible, though the Act of 1868 has been repealed by the Courts of Justice Act, No. 48 of 1936, s. 3, Sched. 1, Part I, and no similar legislation has been enacted to enable foreign judgments to be directly enforced in the Republic of Ireland today. At pages 112–116, discussing the Irish doctrine of domicile, the author curiously stresses the English case *Iveagh* v. *Inland Revenue Commissioners* [1954] Ch. 364 but omits to mention the important Irish case *Iveagh* v. *Revenue Commissioners* [1930] Ir.R. 386 and 431, and the useful restatement of the law of domicile by Black J. in *Re Joyce* [1946] Ir.R. 277 at pp. 300–308. At page 118 the reader is left with the impression that despite the constitutional prohibition of divorce the Irish courts will recognise foreign divorce decrees granted by the courts of the parties' domicile. Admittedly *Re McComiskey* [1939] Ir.R. 573 and *Re Kindersley* [1944] Ir.R. 111 and 137 and *Leake* v. *Douglas* (1954) 88 I.L.T.R. 4 point that way; but in two recent cases, *McCutcheon* v. *McCutcheon* (*Irish Times*, January 18, 1956) Davitt P. and in *Mayo-Perrott* v. *Mayo-Perrott* (1957–58, unreported), Murnaghan J. indicated otherwise. The very recent judgment of the Supreme Court in the latter case (May 22, 1958) apparently leaves this question unsettled. In the course of his excellent analysis of the Constitution of 1937 Dr. Donaldson touches on the mystery of its sources without considering the possibility that John Locke and Thomas Aquinas may, as it were, have helped Eamonn de Valera in the drafting. At p. 173, referring to the case *Re Article 26 of the Constitution and the Offences against the State (Amendment) Bill, 1940* [1940] Ir.R. 470, the author curiously describes it as one in which the emphasis was on personal liberty, though the outcome was judicial approval of a system of arrest and imprisonment without trial on the order of a Minister; and he does not mention the case which gave rise to the amending Bill, *The State (Burke)* v. *Lennon* [1940] Ir.R. 136 and 157, in which the courts, inspired by Gavan Duffy J., leaned heavily in favour of personal liberty. Although the contradictory opinions of two observers on the rôle of natural law in the process of interpreting the Constitution of 1937 are cited, at pages 179–180, the author does not consider the axioms of interpretation the judges have actually employed in such leading cases as *Buckley* v. *Attorney-General* [1950] Ir.R. 67 & 71. At pages 219–224 the author considers the earlier case-law under which the Irish Government was allowed to enjoy the old Crown privilege of priority in payment of debts in bankruptcy proceedings, but does not go on to cite the latest leading case on the question in which a ruling to the contrary effect was given by Kingsmill-Moore J. and the Supreme Court: *Re I. E. M. A., Ltd.* [1955] Ir.R. 176 and 233.

These particular observations only underline the point repeatedly made by Dr. Donaldson himself in this work, that there are extensive areas of modern Irish law still to be exposed in a series of mid-twentieth-century treatises

and that there are a host of problems which have still to be brought into the open in the printed page. This is a pioneer work in the field of Irish public law, and a distinctly good one. It is warmly welcomed by those interested in Irish law and its development.

F. E. Dowrick.

The New Pakistan Constitution. By C. M. Shafqat. [Lahore: The All-Pakistan Legal Decisions. 1957. xxii and 349 pp. Rs. 10 net.]

Public Law Problems in India: A Survey Report. Edited by Lawrence F. Ebb. [Stanford, California: The International Legal Studies Program, Stanford University Law School. 1957. xi and 194 pp. $2.50 net.]

The New Pakistan Constitution is a pioneer work which will be welcomed by all comparative constitutional lawyers. The Islamic Republic of Pakistan has now existed for some two years, and it redounds to Mr. Shafqat's credit greatly that this illuminating work has now appeared, even though it contains a great number of misprints and minor printer's errors (p. 81, for example, is very difficult to decipher, as the print from p. 82 shows through the paper only too clearly). As the author points out (p. ix), Pakistan does not possess a single public law library, and so such small blemishes are scarcely surprising, and they will hardly detract from the almost immeasurable value of the first home-printed guide to the fundamental law of a new-born nation. At the end of the indexes (p. 349) a disarming notice has been inserted: "Due to unavoidable causes the proofs of the book could not be properly scrutinised. The errors and omissions are deeply regretted, and shall be rectified in the next edition." This should soothe any irritations the reader may feel when seeing frequent errors, and the reviewer feels bound to say that very few of the mistakes indeed are on points of substance. The work of course in part forestalls Volume II of Jennings' *Constitutional Laws of the Commonwealth*, which will doubtless also contain the Pakistan material presented here. The only other available book is Gledhill's *Pakistan: The Development of its Laws and Constitution.*

The book can be divided into three parts, the text (210 pp.), the Appendices (120 pp.) and the indexes of cases, names and subject (18 pp.). The Appendices contain the full text of the Constitution Act and of the Indian Independence Act, 1947, the text of the Establishment of West Pakistan Act, 1955, with the schedules omitted, and a short essay on martial law. The main text of the book consists of a commentary on the Constitution, dealt with in logical order, rather than in the numerical sequence of the sections of the Act. A most amusing fourteen-page Introduction by Mr. Justice Kayani is in the form of a commentary upon the commentary. The order of treatment in the text is admirable, and of far more use to readers than one based on the order of the Act. The only criticism the reviewer would suggest is that the sections of the Act concerned might have been quoted in full at the beginning of each chapter of the text. If, however, it should be felt that the complete Act (which is long) ought to remain where it is, then at least a list of the numbers of the sections to be dealt with in each chapter would considerably aid the reader in cross-referencing. Nevertheless the commentary is well balanced and particularly valuable for the wealth of comparison with the constitutional laws of other countries, whether they be federations or not. Reference to the laws of the United Kingdom, the United States, Australia, Canada, India and many European countries is abundant, and each rule is considered in its historical perspective.

Chapter I deals with preliminary topics. The language of the Act is straightforward, but construction of constitutional documents is not necessarily so, and the author lays down the principles to be adopted. Chapter II concerns the particular historical background to the Constitution in Pakistan, and it includes a much compressed account of the great constitutional crisis which preceded the present Act, and which forms the subject of Sir Ivor Jennings' *Constitutional Problems in Pakistan* (reviewed in 20 M.L.R. 683). Chapter III contains a discussion of democracy and the Islamic principles of the Constitution, together with a short account of the law of the Commonwealth. Mr. Shafqat is not inclined to believe that the Commonwealth as an institution means very much today. In particular he points at the position of the Queen as Head of the Commonwealth, which he considers to mean precisely nothing in Pakistan. Now that appeals to the Privy Council no longer lie from Pakistan, a change heartily welcomed by the author, the only link he can find is the annual Prime Ministers' Conference, which he does not believe to count for much. He is, however, forgetting the possible economic effects of membership of the Commonwealth, and, on the legal side, the exchange of High Commissioners, rather than Ambassadors, by full members. The next five chapters are perhaps the most interesting, dealing with the meat of constitutional law. The preamble to the Constitution declares that the Provinces of the federation shall be autonomous. As in Australia, the reserve of powers is granted to them, contrary to the Indian and Canadian Constitutions, but the author shows in his study of federalism (Chap. IV) that the federal and concurrent lists gather a great deal of power into the centre. Chapter V concerns the fundamental rights of the citizen. Probably the importance attached to these rights in Pakistan can be gauged from their appearance at the beginning of the Act, immediately after the delimitation of the territories of the Republic. The author states that "the philosophy underlying these rights is basically un-English and the method of their enforcement is technically poles apart from the English view of punishment after infringement" (p. 76), and he compares the Indian experience, where the inclusion of the rights in the Constitution seems to have worked well. Chapters VI–VIII deal respectively with the legislative, executive and judicial functions and powers. Pakistan has a unicameral legislature, the National Assembly (and the Provinces each have a Provincial Assembly). There is perhaps no good reason why any second chamber should be required in Pakistan, yet the reviewer feels that Mr. Shafqat exaggerates when he wholeheartedly endorses the over-simplified statement that if the second House agrees with the first it is needless, and if it does not it is obstructive (p. 93). Pakistan follows the British model in that Ministers are responsible to the legislature, although certain discretionary powers are vested in the President, who rises above legislative control. The author prefers the United States system, whereby the President embodies the executive and the separation of powers is more strictly enshrined in the Constitution, as an aid to stability in a young country. Nevertheless some few of the most important elements of the British Royal Prerogative have been vested in the President, for example, the executive functions of making war and peace (with the same safeguards as in the United Kingdom). This, to the reviewer's mind, compares favourably with the cumbersome process in the U.S.A., where Congress must sanction the declaration of war itself, even though, once the declaration is approved, the President has very extensive war powers in order to "take Care that the Laws be faithfully executed" (*Constitution,* Art. II, s. 3). The Pakistan Supreme Court is created largely for the purpose of interpreting the Constitution; and it is interesting to note that the methods of judicial control of administrative tribunals are largely parallel to our own. The final chapter has the engaging title "Odds and Ends," and is concerned primarily with the preamble, transitional provisions and the language problem. Urdu and Bengali are declared to be the "State" (not official) languages, though

English is also permitted for twenty years; even thereafter the legislature may provide for its use for specified purposes, and Mr. Shafqat himself considers that it is likely to remain indefinitely as the principal tongue of Pakistan.

Public Law Problems in India is published, with the aid of the Ford Foundation, in a paper cover, within which the printer has used a typewriter face. It results from the proceedings of a conference held at the Stanford Law School in July and August, 1957, between five Indian and four American lawyers. The object of the conference was to explore the rules extant in India upon certain crucial public law problems, with a view to preparing the way for a later large-scale planning conference soon to be convened in India. The Stanford conference, therefore, has decided which topics ought to be scrutinised, and the present volume contains some fifteen short papers compiled by members of the conference, each upon one of these subjects. Each paper gives a short account of the problem raised, an idea of what the present position of Indian law appears to be, and, usually, an idea of the solution provided by the much older federation of the United States. But the aim is not to reach conclusions; it is to stimulate further thought, research and comparison. The material is sometimes rather too compressed for easy reading, a fault not helped by the unfortunate choice of print, but on the whole the book succeeds in its intention. Perhaps the most interesting papers are those on "Administrative Law—The Right to a Fair Hearing," "Government Privilege not to Produce Documents in Court," "Comparative Constitutional Problems of Freedom of Speech, Press and Assembly," and "Operations and Effect of the Amending Provision of the Constitution of India."

D. C. M. YARDLEY.

THE CONSTRUCTION OF DEEDS AND STATUTES. By SIR CHARLES E. ODGERS. Fourth Edition. [London: Sweet & Maxwell Ltd. xxvii and 354 pp. 35s. net.]

THE fourth edition of this book, which has secured an established position among works of its dimensions by reason of its due balance between statement of principle and illustrative or referential instance, together with a high standard of accuracy, has an interesting preface which looks both to its past and to its future.

Part I, dealing with the individual parts of a deed, was originally written by the late Professor Harold Potter, well remembered by his friends as a learned real property lawyer as well as legal historian.

The section on Delegated Legislation has been entirely rewritten, the first part of which on the nature and methods of such legislation being the work of Mr. John Burke, whose editorship of *Current Law* must have afforded him an unrivalled, if unenviable, contact with this development of legislative growth. The author concludes his Preface in a valedictory vein, which all of us who have derived benefit from his writings trust is premature. He credits the late Mr. Harold Maxwell with "the idea of writing a small book containing the general principles of the construction of both deeds and statutes," and observes that he has "enjoyed the research which the making of the book involved, and the collection of cases bearing on the twin subjects in it."

That joy can be fully shared by the reader, for, although not everyone within or outside the legal profession can be expected to consider the perusal of legal textbooks as an excursion into the realms of *belles-lettres* as a rule, like most rules, there are exceptions and it would be no exaggeration to state that, given an interest in the subject, Sir Charles Odgers' book has a fascination which carries one along further than the point that prompted the opening of its pages. It may well go beyond the sphere of readers indicated and create an interest in the subject among wider groups.

The book is divided into two parts, Part I dealing with Deeds and other instruments, Part II with Statutes. Part I covers a vast area of law, and the epitomisation of the applicable principles and the illustrations are, in general, most apt and elucidating, although one perhaps could have wished for a less unsatisfactory case than *Clayton* v. *Ramsden* [1943] A.C. 320 as an instance of a provision void for uncertainty, but there are others given which could not be bettered. On pages 36 and 37 there is an excellent presentation of the degree of authority given to the practice of conveyancers, and later at page 229 in Part II, *Countess Radnor* v. *Vandebendy* (1686) Show.Parl.Cas. as well as *Bassett* v. *Bassett* (1744) 3 Atk. 206, at p. 208, are cited as instances of cases determined on the practice. To anyone concerned in the construction of deeds and other instruments, a dip into Part I will surprise as to the considerable amount of assistance the book will provide, while Part II is a lamp which can light the difficult path of legislative interpretation and illuminate many a dark corner. Its scope is very wide and amazingly so having regard to the dimensions of the volume which, among its many other merits, is easily portable. While both parts are of the first importance, the enormous increase in Statute Law and subsidiary legislation makes the subject of Part II a matter of urgent moment. The survey and analysis of the framework of a Statute are admirably done, as also the section (p. 308) on Methods of Construction. There are many references to cases which enlarge the readily available range of authorities and several legal maxims are usefully explained. The final pages of the book consider the subject of tax avoidance, regarded from the standpoint of the interpretation of Statutes. They are a solace to the taxpayer whose burden conveyancing draftsmen seek to relieve, but nevertheless the dictum of Lord Greene M.R. cited at pages 332–333 must be carefully borne in mind.

The outstanding difficulty in writing a textbook on so comprehensive a subject is to appreciate how far to go and not lose one's way with the ramifications which suggest themselves at every turn. The reader who does not find what he wants must bear that in mind, and let him be grateful for the immense resources placed at his disposal. For the practitioner it is first aid and much more—for the law student a first sequel to his introduction to the English legal system. The table of cases runs to nineteen pages, and just over that number of pages of index.

BERTRAM B. BENAS.

NOT GUILTY. By JUDGE JEROME FRANK and BARBARA FRANK, in association with HAROLD M. HOFFMAN. [London: Victor Gollancz. 1957. 261 pp. 18s. net.]

A QUARTER of a century ago, Professor E. M. Borchard stirred the legal profession by publishing, in his famous book *Convicting the Innocent*, a full account of no less than sixty-five criminal cases which had resulted in wrongful convictions. Shortly before his death in 1957, Judge Jerome Frank, always a staunch, indeed passionate, champion of civil liberties and fair trial, had arrived at the conclusion that, in his own country at least, too many people had once again become apathetic to the deficiencies of procedure which are likely to lead to judicial error. In collaboration with his daughter Barbara he therefore set out to bring together a book which would interest the lay public and convince it of the need for constant vigilance against the danger of miscarriage of criminal justice. *Not Guilty* describes, in summary manner, some thirty-six recent American cases where conviction was subsequently proved erroneous, and follows this up with an analysis of the reasons, comment and suggestions put forward with the full force of his wide experience on the Bench. The result is an outstandingly significant and stimulating work which has an importance out of all proportion to its slender size.

It is also a frightening and dramatic work: frightening, because it shows up the countless danger points in present trial methods; dramatic, as soon as one becomes aware, with a terrible shock, that for each case where an erroneous conviction stood eventually revealed as such, sometimes after many years of laborious investigation undertaken at private initiative and expense, there must be others which have gone (and are going) unnoticed and wholly unremedied. Some of the chief defects and irregularities of procedure responsible for the miscarriages of justice recorded in Judge Jerome Frank's *Not Guilty* are admittedly peculiar to the United States. Graft and overzealousness on the part of the prosecution for instance are fortunately not matters which enter largely into our trials, and when the authors state unequivocally that "it is common knowledge that the third degree, in recent years, has been applied in almost every state of the Union," we can (let us hope) rejoice in the knowledge that the "infamy" of such police methods is spared us in this country.

But no such complacency is permissible when we come to consider the sources of error which are due, not to a deliberate flaunting of the guarantees designed to ensure fair criminal trials, but to inherent weaknesses of the evidence by which proof of guilt is built up in a court of law. It has often been pointed out that jury trial and our rules of evidence are well calculated to expose the mendacious witness, but inadequate to cope with the dangers of testimony honestly given but vitiated by mistaken perception and/or recollection. Thus, for instance, Judge Jerome Frank is at pains to point out that "erroneous identification of the accused constitutes perhaps the major cause of the known wrongful convictions," and that more often than not, this is the result of an "honest error" made by the witness. "Could such honest mistakes be exposed during investigation before the trial?" he asks, and the answer he gives is "Yes, in many instances." And yet we know that under the law as it stands, in this country as well as in the United States, it is by no means uncommon for false arrests to be carried out in almost blind reliance upon the outcome of an identification test or parade without making absolutely sure that the desired result was not in one way or another suggested to the witness and without fully convincing prior investigation into his accuracy as an observer, his ability to see and hear and reliability of his memory.

No improvement in our methods of trial will make it possible to avoid altogether erroneous convictions such as are described in this volume. Many of them could not have conceivably occurred in this country, but a justified pride in the superiority of our criminal trials over some at least which seem to take place in the United States should not blind us to the many shortcomings raised in Judge Jerome Frank's challenging posthumous work which may, conceivably, even in this country, bring about that most appalling of calamities: a miscarriage of justice.

H. A. Hammelmann.

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Bell's Sale of Food and Drugs. 1st Service Issue. 1958. Service, Binders and Cards. £1 8s. Complete Work of Service Issue. Butterworth & Co., Publishers, Ltd. £6 18s. net.

Emmet on Title. Fourteenth Edition. First Supplement to February 28, 1958. By J. Gilchrist Smith, ll.d. The Solicitors' Law Stationery Society, Ltd. xxx and 104 pp. 15s. net.

Journal of the International Commission of Jurists. Vol. I, No. 2. Spring-Summer 1958. Editor: Norman S. Marsh, 47, Buitenhof, The Hague, Netherlands.